No. 83-401

Office-Supreme Court, U.S.
FILED
SEP 6 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

A. E. STALEY MANUFACTURING COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE B. CHRISTENSEN
(Counsel of Record)

COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner

A. E. STALEY MANUFACTURING COMPANY

Of Counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

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QUESTIONS PRESENTED

1. Whether a "systemic" charge (an EEOC invention described in its Press Release of March 20, 1978 (App. 96a)) filed by a Commissioner of the Equal Employment Opportunity Commission, which violates § 706(b) of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e-5(b)) by failing to state the approximate dates of the alleged violations or *any* factual "circumstances", may be approved by the Courts without violating their obligation to respect congressional limitations on the jurisdiction of the agency?

2. Whether a charge filed by a Commissioner of the EEOC which fails to satisfy the date and circumstances requirements of § 706(b) of Title VII, may be aided or bolstered by representations of a Commission lawyer as to what he thinks the Commissioner did?

3. Whether EEOC has authority under § 709(a) of the Act to investigate an employer's practices where it is uncontroverted that no unlawful acts relevant to the charge could have been committed within 180 days of its filing because the employer neither recruited, hired or terminated any relevant personnel and all of its relevant employment decisions were made pursuant to a bona fide seniority system?

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OPINIONS BELOW

The District Court's opinion enforcing Respondent, Equal Employment Opportunity Commission, administrative subpoena is unreported and is attached hereto at Appendix 78a. The opinion of the Court of Appeals affirming the District Court's opinion is not officially reported as of this writing and is attached at Appendix 1a.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 1, 1983. The order denying Staley's Request for Rehearing was entered on July 20, 1983 (App. 95a). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U. S. C. § 1291 and the District Court's jurisdiction was invoked pursuant to 42 U. S. C. § 2000e-9 and 29 U. S. C. § 161.

STATUTES AND REGULATIONS INVOLVED

Section 703(h) of Title VII (42 U. S. C. § 2000e-2(h)) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system. . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . .

Section 706(b) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-5(b)) provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer. . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer. . . Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Section 706(e) of Title VII (42 U. S. C. § 2000e-5(e)) provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful practice) shall be served upon the person against whom such charge is made within ten days thereafter. . . .

Section 709(a) of Title VII (42 U. S. C. § 2000e-8(a)) provides:

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful practices covered by this subchapter and is relevant to the charge under investigation.

Section 710 of Title VII (42 U. S. C. § 2000e-9) provides:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies section 161 of Title 29 shall apply.

Section 1601.12 of the Equal Employment Opportunity Commission's Procedural Regulations (29 C. F. R. § 1601.12) provides, in pertinent part:

> (a) Each charge should contain the following:
>
> * * *
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices.

STATEMENT OF THE CASE

September 30, 1980, EEOC Commissioner Daniel E. Leach filed a so-called "systemic" charge, devoid of factual allegations, of unlawful discrimination by Staley, a large corn and soy bean processor at Decatur, Illinois, continuously since July 2, 1965. (App. 20a)[1] It alleged, solely in conclusory terms, that Staley had discriminated against Black and female "blue-collar" employees and applicants for employment in virtually all respects ever since Title VII's effective date.

Staley received Notice of the Charge October 6, 1980. (App. 19a). The Notice merely attached the boiler-plate charge and did not otherwise set forth the date, place or circumstances of the alleged unlawful practices. Staley, without waiver of its rights, requested EEOC to provide it with alleged facts which formed the basis of the charge so that it might cooperate with an investigation (Letters to EEOC, December 17, 1980 and January 15, 1981 at App. 23a and 25a).

EEOC took the position that Staley was not entitled to know the basis of the charge and refused to provide *any* facts regarding it.

On February 17, 1981, Acting Director Kelly of EEOC's Chicago District Office, issued a dragnet administrative subpoena demanding virtually every document related to employ-

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[1] A. E. Staley Manufacturing Company is a Delaware corporation. It has the indicated percentages of equity in the following companies:

Graanderivaten Raffinaderijen Amylum N.V. (Belgium (33⅓%); Tunnel Refineries Ltd. (London, Eng.) (33⅓%); Staley Commodities International, Inc. (Chicago); Almidones Mexicanos, S.A. (Mexico) (50%); Hendricks & Sommer/Kunstharze K.G. (West Germany) (50%); Sociedad Iberica de Molturacion, S.A. (Spain) (50%); Stapol, S.A. (Switzerland) (50%); Midwest Processing Co. (Velva, N.D.) (33⅓); Bio-Technical Resources, Inc. (Wisc.) (40%).

ment practices for all employees, positions and departments since January 1, 1978. (App. 26a).

Staley tried to avoid litigation by offering to provide relevant information if EEOC notified it of what alleged facts formed the basis for the charge. EEOC refused. Staley exhausted its administrative remedies. (App. 36a-46a, 64a) (The steps are set forth in the Court of Appeals opinion at App. 3a).

Staley's Statement of Position (App. 47a) along with an affidavit (App. 63a) provided much of the information the subpoena sought. That information, showed that Staley had not recruited, hired or fired any relevant personnel within 180 days of the filing of the charge and that its promotion, training and job assignment practices were made pursuant to a long-standing, bona fide seniority system negotiated with the appropriate union.

On December 23, 1981, EEOC sought enforcement of its subpoena by the United States District Court for the Northern District of Illinois. (App. 66a). Staley objected that the underlying charge was invalid and, that in the absence of any violations within 180 days of the filing of the charge, EEOC lacked authority to investigate.

Staley also showed, on the basis of the finding of the United States District Court for the Eastern District of Michigan in *EEOC* v. *K-Mart*, 526 F. Supp. 121 (1980), affirmed on this but reversed on other grounds, 694 F. 2d 1055 (6th Cir. 1983), that EEOC inserted July 2, 1965, as the beginning date of the alleged violation in so-called systemic charges not on the basis of *fact*, but as a *mere matter of EEOC policy*.

Nevertheless, on April 5, 1982, the District Court ruled the charge was valid. (App. 77a, 80a). Judge Getzendanner noted, however, that Staley had raised a substantial question that enforcement of the subpoena would be abusive in light of Staley's showing that it had not recruited or hired any relevant personnel within 180 days of the filing of the charge. She

refused to grant a hearing on the matter because the subpoena also sought data regarding promotion and training and Staley had not shown, so she opined, that there was no basis for the charge regarding those policies (App. 79a n.*).

On that same day, this Court, in *American Tobacco Company* v. *Patterson*, 456 U. S. 63, (1982), held that employment decisions made pursuant to a bona fide seniority system are immune from attack under § 703(h) of the Act on the claim that such system perpetuates the effects of past discrimination.

Likewise, the District Court for the District of Colorado, in *EEOC* v. *C.A. Norgren Company*, 28 FEP 590 (1982) on March 10, 1982, found, as had the *K-Mart* court, that EEOC has a policy of inserting the Act's effective date, as a matter of course in Commissioner charges. Based upon these intervening authorities, Staley moved the District Court to reconsider and stay its April 5, 1982 order (App. 81a).

At hearing on this motion (App. 86a-92a) Judge Getzendanner stated that this Court's *American Tobacco* decision was irrelevant. She determined, however, that *C. A. Norgren* was germane to the issue of whether the date was properly stated. EEOC's counsel represented that the Commissioner had based the date on some unidentified data. Judge Getzendanner first doubted her ability to rely on such representations in the absence of evidence of record. But she dispelled the doubt. On the basis of that unsupported representation, she held that the date had been properly inserted, saying,

> "On the basis of that representation, the motion for reconsideration is denied." (App. 91a).

Staley appealed.

Before the Court of Appeals, EEOC's counsel admitted that the Commissioner's charge was merely an exercise of the Commission's "systemic" program; that Staley was selected for

investigation because some unidentified data established not that Staley had violated the law, but that it satisfied one or more of the program's purported criteria for snooping as to whether violations *might* have occurred.

The Court of Appeals, by a 2-1 decision (Bauer, C.J. dissenting with opinion App. 17), affirmed. (App. 1).

As to the requirement that the employer be notified of the circumstances of the alleged violation, the majority held, apparently in the interest of administrative convenience, that the charge need not set forth the factual basis upon which it is issued. It drew a nonexistent dilemma between the particulars required in a law pleading and a mere naked accusation of violation of law not recognizing that there is a middle ground (App. at 8a, 10a).

As to the date requirement, the majority apparently agreed, as a matter of theory, with all courts which have considered the issue that the date alleged must be at least "a good faith estimate" of the beginning date of the alleged violation (App. at 12a). But it said the Commissioner's "good faith" is "presumed" (virtually unrebuttably), thus gutting the requirement. Then the majority, as we read its opinion at App. 13a, transformed EEOC's counsel's unsupported "representations" into "testimony" sufficient to overcome the "bare unsupported" findings of fact of two United States District Courts that the effective date of the Act was inserted simply as a matter of Commission practice.

Judge Bauer, on the other hand, held that the charge "failed to meet the statutory requirements [of sufficient facts to comply with the date, place, and circumstances]. (App. 17a).

REASONS FOR GRANTING THE WRIT

This case is considerably like the Eighth Circuit case of *EEOC* v. *Shell Oil Company,* No. 82-825 here, which is now awaiting oral argument. The cases present opposite sides of the same coin: What must an EEOC Commissioner's charge contain in order to comply with the notice requirements of § 706(b) of the Civil Rights Act? In *Shell* the Eighth Circuit rejected a charge virtually identical to the one approved in this case by the Seventh Circuit. 676 F. 2d 322, *as modified on denial of rehearing en banc* (1982)

The Court, we respectfully suggest, should grant the writ so it can rule directly whether the Eighth Circuit was correct in *Shell* or the majority of the Seventh Circuit here. Additionally, this case raises a disturbing question of whether an EEOC Commissioner's charge may be amended or bolstered by parol representations of a non-Commissioner.

The Eighth Circuit, applying accepted standards of statutory construction, i.e., examining the language, structure and legislative history and applying the statute so as not to render any of its terms meaningless, held that a Commissioner's charge must set forth the believed date and "factual basis" upon which the charge is based in order to meet the date and circumstance requirements of the statute.

However, the majority opinion, blind to administrative aggrandizement, applied an "administrative convenience" standard of statutory construction rejected by this Court in *Marshall* v. *Barlow's Inc.,* 437 U. S. 307 (1978) and in *Immigration and Naturalization Service* v. *Chadha,* ____ U. S. ____, 51 U. S. L. W. 4907 (June 23, 1983) and quoted with approval from *EEOC* v. *K-Mart,* 694 F. 2d 1055, 1068 (6 Cir. 1983):

> Requiring the EEOC to justify each charge would divert the EEOC from its primary purpose of determining whether there has been a violation of Title VII. (App. 11a.)

(The Sixth Circuit held (*EEOC* v. *K-Mart*, 694 F. 2d 1055 (1983)), that a Commissioner's charge must set forth the *date* but not the "circumstances" of the alleged violation).

Thus runs the gamut: Eighth Circuit: approximate date and "factual basis" required (*Shell*); Sixth Circuit: approximate date but no "factual basis" required; validity must be determined from face of charge (*K-Mart*); Ninth Circuit: *semble*, (*EEOC* v. *Dean Witter Co.*, 643 F. 2d 1334 *rehearing denied*, (1980)); Seventh Circuit: "circumstances" not required and date may be validated by parol from a non-Commissioner (*Staley*). Chaos; a judicial smorgasbord calling for the Court's intervention. Certiorari has not been sought in *K-Mart* but at least the Court can accept this case and, with *Shell*, have both ends of the spectrum within its direct jurisdiction in solving this confusion.

Additionally, this case has other important ramifications that make it desirable for the Court to settle as many relevant questions in this disturbed field at one sitting and with the whole picture (so far as it has developed), before the Court.

The arguments advanced by Shell and its *amici* in No. 82-825 showing the invalidity of the Commissioner's charge and notice in that case apply here. The charge here, as in *Shell*, contains nothing more than conclusory allegations that the employer violated the Act in virtually all respects, but is devoid of *any* factual circumstances. We endorse Shell's arguments and those of its associated *amici*, but will not burden the Court by repeating them. Instead, we confine ourselves to additional points: the effect of *Chadha* on judicial review of administrative actions; EEOC's attempted parol embroiderment of the charge; and EEOC's jurisdiction to investigate the late issued charge, issues not present in *Shell Oil* (or *K-Mart*).

I.

The Seventh Circuit Eviscerated Congress' Intent That Charged Parties Be Given Notice Of The Date And Circumstances Of The Alleged Unlawful Practice

In *Immigration and Naturalization Service* v. *Chadha,* the Court held that Congress, which had sought for many years to control administrative agencies by unicameral veto, acted unconstitutionally in so doing. This means that Congress, in order to control administrative bodies, must pass statutes that set forth certain and precise boundaries.

In the statute at bar, *Congess did exactly that:* Former § 706(a) of the Act showed Congress' determination that employers be free from the whims of an "errant and arrogant bureaucracy" by "nail[ing] down" the requirements that a Commissioner's charge not issue unless based upon alleged facts and that those alleged facts be set forth in the charge. Legislative History of Titles VII and IX of the Civil Rights Act of 1964 at 3313 (remarks of Congressman Goodell and Congressman Cellar, Chairman of the House Judiciary Committee) (EEOC Compilation printed by W. S. Hein & Co. (1968)).

The right of a Commissioner to issue a charge was not intended to create roving inquisitorial jurisdiction but to protect the anonymity of a complaining individual who, it might be feared, was in danger of retaliation. Legislative History of Titles VII and IX of the Civil Rights Act of 1964 at 3305 (remarks of Senator Case).

Congress further limited EEOC's authority in the 1972 amendments by requiring in § 706(b) that charges be made on oath or affirmation and that EEOC promptly notify the charged party of the date, place and *circumstances* of the alleged unlawful practice. One of the purposes of this amendment was "to protect fully the rights of the person or persons against whom the charges are filed." S. Rep. No. 92-415 p. 25 (1971),

and "to give [the charged party] an opportunity to gather and preserve evidence...." *Occidental Life Insurance* v. *EEOC*, 432 U. S. 355, 372 (1977).

Moreover, Congress specifically declined EEOC's request for independent authority to investigate employers to determine if they had engaged in alleged "pattern and practice" or "systemic" discrimination. *See* Testimony of William H. Brown, III, Chairman of EEOC, Legislative History of Equal Employment Opportunity Act of 1972 at 932 (1972). Instead, Congress, restricted the Commission, in § 707(e), to investigating such matters only after it had received a charge which complied with § 706(b).

Thus, Congress *did* create boundaries and place definite requirements on the EEOC. And where Congress has established such boundaries on an agency's authority, neither that agency or the courts can disregard them. *Cf., American Textile Mfrs. Inst.* v. *Donovan*, 452 U. S. 490, 509 (1981).

The majority of the panel here ignored the plain language of § 706(b) and the legislative history and gave EEOC the very roving inquisitorial jurisdiction that Congress specifically denied it.

There is no suggestion in the statute or the legislative history that Congress intended the term "circumstances" to be a word of vacuity. *See e.g., DeBartolo Corp.* v. *NLRB*, ____ U. S. ____, 51 U. S. L. W. 4984, 4986 n.7 (June 24, 1983). Accordingly, the Seventh Circuit should have given the term its ordinary meaning. *American Textile Mfrs. Inst.* v. *Donovan*, 452 U. S. at 508-509.

Webster's Third New International Dictionary defines "circumstance," *inter alia*, as "*a condition, fact or event* accompanying, conditioning or determining another;" or "as an evidential condition on the basis of which an event may be inferred or an accusation made probable;" or as "an occurrence or fact viewed as a detail in a large continuum." Thus, § 706(b)

directs that EEOC shall serve a notice of the charge (including the date place and "conditions, facts or events" of the alleged unlawful practices. *Cf. American Textile Mfrs.* v. *Donovan* at 509.

The Court of Appeals majority effused on the "remedial purpose of the Act" and the "liberal standard" which should be applied. In so doing it ignored the Court's teaching of *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 405 (1977) that Title VII's "remedial purpose" and "liberal standard" does not excuse failure to pay *careful attention* to the law's requirements. and the Court's instruction in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 at 825, 826 (1980) that the "remedial purposes" of Title VII are best served by a *literal* interpretation of and *strict adherence* to the Act's procedural requirements.

Finally, the Seventh Circuit's gutting of § 706(b)'s, requirements gives EEOC the very roving inquisitorial authority that Congress specifically denied it. Without the requirement of a factual basis for the charge the Commission can launch an investigation simply because the employer is a large company; because the employer is in a period of expansion or retrenchment; or because other employers may emulate the employment practices of its target. *See*, EEOC Bulletin of March 20, 1978 (App. 96a)

The procedural structure of Title VII is patterned primarily after the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) and, in fact the majority opinion refers to some Labor Board cases. No one, however, has yet had the temerity to suggest that Congress gave the NLRB authority to in effect rule:

> The ABC Company is a substantial employer in Wyoming County, but it is only 30% organized. Let's file a charge and find out if its intimidating employees.

Yet that is the sum of what the Commission did here.

A "systemic" charge is not, as the statute requires, a charge that an employer *has* violated the law, but an undisguised inquisition as to *whether* it *might have*. Hence, its inherent and unavoidable inability to supply date and circumstance. A

"systemic" charge makes a Commissioner's oath a farce—his good faith, so far as statutory requirements are concerned, non-existent.

If the upshot of *Chadha* is that if Congress wishes to confine the actions of an agency, it behooves Congress to be specific in its legislation, the necessary corollary is that where Congress *has* so acted, the courts must respect that limitation and not "alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Mohasco Corp.* v. *Silver,* 447 U. S. at 826, *Chadha,* we respectfully suggest, has added a new diminsion to judicial review of administrative action that should be explored and defined by this Court.

The Court, having taken the important step it took in *Chadha,* it follows, we humbly suggest, that the burden to see that the corollary of *Chadha*—judicial respect for, and enforcement of, legislatively established limitations on administrative agencies—should be enunciated by the Court. It seems likely that if delineation of the corollary were left to the Courts of Appeals the matter would be buffeted about for years. But on plenary consideration of the case at bar, the Court could authoritatively determine the extent of the corollary and avoid what otherwise well might be unsettling and endless judicial confusion.

II.

The Validity Of A Commissioner's Charge Must Be Determined On Its Face

This case presents another question not present in *Shell:* whether the validity of a Commissioner's charge must be determined from its face or whether a defective charge may be cured by the *post hoc* rationalization and representations of a non-Commissioner.

In *EEOC* v. *K-Mart,* 694 F. 2d at 1064 the Sixth Circuit held that a Commissioner's charge which merely set forth the

effective date of the Act, but no facts showing the appropriateness of that date was void on its face for failure to provide some objective basis for determining when the alleged unlawful practices began. It held that a charge must be weighed *on its face. Accord, Shell,* 676 F. 2d at 322.

The panel's majority here, while approving certain *dicta* in *K-Mart* disagreeing with the *Shell* decision on other points, wholly ignored their agreement on this point. 694 F. 2d at 1064 n.10. Rather than dismissing the charge as void on its face as in *K-Mart,* the Seventh Circuit accepted EEOC's counsel's eleventh-hour representations that the date in the Staley charge was based on something. Nowhere, however, does the "something" appear in the charge.

As to the requirement that the date of the alleged offense be set forth, the majority opinion is self-contradictory. It first holds (App. 12a) that:

> "The 'date' element of § 706(b) is an important statutory requirement."

It then held that after "hearing testimony," "the District Court accepted the statement of the EEOC that there was no pro forma insertion of the effective date of the action in this case." (App. 89a) and that the District Court's determination was not clearly erroneous even though the subpoena was directed only to 1978 and 1979. (*Cf. EEOC* v. *K-Mart Corp.,* 694 F. 2d 1055, 1064, n. 8.)

The Seventh Circuit paid subservience to the presumed "good faith" of the Commissioner in extending his jurisdiction beyond that set by Congress and transformed counsel's "representations" into "*testimony*" (thereby condoning violation of the canon that a lawyer may not testify in his client's behalf in a case in which he is representing his client). It accepted such unsupported "testimony" over the findings of two District Courts as to the Commission's practice.

The Seventh Circuit acted in direct contravention of this Court's teachings in *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168 (1962) and *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U. S. 438, 442 (1965) that the validity of an agency's action must be determined from the evidence of record and not from counsel's *post hoc* claims and rationalizations.

III.

EEOC Lacks Jurisdiction Because Of Limitations And The Existence Of A Bona Fide Seniority System

Staley voluntarily provided the EEOC with much of the information requested in the subpoena. Contrary to the Seventh Circuit, that information was not an attempt to argue the *merits* of the case; it was offered to show that EEOC lacked jurisdiction to investigate the charge because *no* unlawful acts could have occurred within 180 days of the filing of the charge.

In *United Air Lines, Inc.* v. *Evans,* 431 U. S. 553, 558 (1977), the court held that actions which were not the subject of a timely charge are "the legal equivalent of a discriminatory act which occurred before the statute was passed." Thus, under § 709(a), EEOC has no jurisdiction to investigate Staley's hiring, recruitment or termination practices because *no* such actions (probably because of the unfortunate economic recession) involving relevant personnel occurred within 180 days of the filing of the charge. Thus, whatever those practices were before March 30, 1980, they were not unlawful practices covered by the sub-chapter.

Likewise, EEOC may not investigate Staley's training, promotion and job assignment practices because all such decisions are made pursuant to a *bona fide* seniority system and hence lawful under § 703(h). *United Air Lines* v. *Evans; Teamsters* v. *U. S.,* 431 U. S. 324 (1977); *American Tobacco Co.* v. *Patterson.*

Here, the Commissioner does not allege that the seniority system is not bona fide, that Blacks and women are treated differently under it or that it is not adhered to. Instead, Commissioner Leach alleged that the system "operate[s] to perpetuate the effects" of discriminatory policies. (App. 21a). This is precisely the opposite of the Court of Appeal's reasoning at App. 15a, "we have only the mere assertion by Staley that its employment decisions are effected pursuant to a bona fide seniority system." The charge plainly said that they were and that they perpetrated discrimination. But the Court held in *American Tobacco* that a seniority system which merely perpetuates the effects of discrimination is lawful under § 703(h).

The Seventh Circuit ignored the plain meaning of the statute. Instead of determining whether the documents sought by the EEOC related to unlawful practices, the Seventh Circuit looked only to whether the documents were relevant to the charge ignoring the intervention of Title VII's time limitations and a seniority system which EEOC does not claim is *mala fide* or is not followed.

The Court, we suggest, should consider whether the limitation provisions and the seniority endorsement of the statute may be ignored by the Commission when it undertakes a limitless, "systemic" inquisition as to what may have gone on at some time. These questions are not presented in *Shell* but, in the interest of settling a continuing, troubled field, should be considered by the Court at the same time it considers *Shell.*

Prayer

It is respectfully prayed that the writ of certiorari issue and that the case be heard in conjunction with *EEOC* v. *Shell Oil Company*, No. 82-825.

Respectfully submitted,

GEORGE B. CHRISTENSEN
(Counsel of Record)

COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner

A. E. STALEY MANUFACTURING COMPANY

Of Counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1655

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner-Appellee,

v.

A. E. STALEY MANUFACTURING CO.,

Respondent-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 7182—Susan Getzendanner, *Judge.*

ARGUED NOVEMBER 8, 1982—DECIDED JULY 1, 1983

Before CUMMINGS, *Chief Judge*, BAUER, *Circuit Judge*, and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* Respondent-Appellant, A. E. Staley Manufacturing Company, appeals from a district court order enforcing an administrative subpoena issued by the Equal Employment Opportunity Commission (hereinafter "EEOC") pursuant to § 710 of Title VII of the Civil Rights Act of 1964. A. E. Staley Manufacturing Company (hereinafter "Staley") raises three issues for our consideration:

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

I. Whether the EEOC's charge is invalid as failing to meet the statutory requirements of § 706(b) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(b));

II. Whether the administrative subpoena is unconscionably burdensome;

III. Whether Staley is entitled to a hearing on the issues before the subpoena is enforced?

Facts

On October 6, 1980, the Equal Employment Opportunity Commission filed its charge that Staley and Local 837, Allied Industrial Workers of America, had unlawfully discriminated against women and blacks because of their sex and/or race in violation of §§ 703 and 707 of Title VII of the Civil Rights Act of 1964 (hereinafter "the Act"). The charge specified six discriminatory practices of Staley and Local 837.[1]

[1] The charge provided as follows:

COMMISSIONER CHARGE

Pursuant to the authority contained in Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e), *et seq.*, I charge the employer and labor organization listed below with unlawful employment practices occurring at or controlled from the employer's facility:

A.E. Staley Manufacturing Company
2200 East Eldorado Street
Decatur, Illinois 62525

Allied Industrial Workers of America
Local 837
R.R. #2—Box 177
Assumption, Illinois 62510

I believe that the above employer and labor organization are within the jurisdiction of the Equal Employment Opportunity Commission and have violated, since at least July 2, 1965, and continue through the present to violate Section 703 and Section 707 of the Civil Rights Act of

(Footnote continued on following page)

The EEOC served Staley with the charge and with it a request for information. Staley countered with a

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[1] *continued*

1964, as amended, by unlawfully discriminating against blacks and women because of their race and/or sex with respect to recruitment, hiring, assignment, promotion, training, termination, and other terms, conditions and benefits of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit and select blacks for all blue collar positions on an equal basis with whites because of their race; failing or refusing to recruit and select women for all blue collar positions, on an equal basis with men because of their sex.
2. Restricting and/or excluding blacks and women from all blue collar positions because of their race and/or sex.
3. Restricting and/or excluding blacks and women from the opportunity to work in all blue collar departments because of their race and/or sex.
4. Failing to provide blacks and women with opportunities for promotion, assignment, and training equal to those afforded to whites and men because of their race and/or sex.
5. Terminating women, because of their sex, at a greater rate than men.
6. Maintaining discriminatory policies and practices and other terms and conditions of employment which operate to disadvantage blacks and women because of their race and/or sex.

Specific unlawful employment practices engaged in by both the employer and the labor organization include, but are not limited to, maintaining seniority, posting, and bidding systems as well as other systems contained in the collective bargaining agreement which operate to perpetuate the effects of the employer's discriminatory hiring, assignment, promotion and training policies.

The persons aggrieved include all blacks and women who have been, continue to be, or may in the future be adversely affected by the unlawful practices complained of herein.

demand for a detailed account of the factual basis underlying the Commissioner's charge. On February 17, 1981, following Staley's failure to supply the requested information, the EEOC issued a subpoena requesting information concerning employment and personnel practices of Staley covering the period January 1, 1978 to February 17, 1981. On February 20, 1981, Staley petitioned the Chicago District Director of the EEOC to revoke or modify the subpoena, but these objections were rejected by the District Director. Staley then appealed the denial to the full Commission. In August 1981, the Commission upheld the District Director's denial of Staley's petition to revoke or modify the subpoena and ordered Staley to comply with the subpoena by September 9, 1981. On December 28, 1981, following Staley's continued refusal to comply with the subpoena, the EEOC filed this action. The district court issued an ex parte order granting the application on December 30, 1981.

On April 5, 1982, the district court ordered the enforcement of the administrative subpoena, holding that the Commissioner's charge satisfied the statutory requirements of § 706(b) because it alleged the time, place and circumstances of the alleged unlawful employment practices.[2] The court specifically rejected Sta-

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[2] Section 706(b) of the Act is cited at pp. 8-9 of the opinion. The provision in 29 C.F.R. § 1601.12(a)(3) (1981) relied upon by the dissent provides:

> a) Each charge should contain the following:
>
> • • •
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . .

However, 29 C.F.R. § 1601.12(b) provides:

> b) Notwithstanding the provisions of paragraph a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.

ley's argument that the charge must allege reasonable cause, finding that all the statute requires is that the charge be made under oath. The court found that the information which the EEOC requested was material and relevant. Furthermore, the court rejected Staley's contention that the subpoena was burdensome because Staley had failed to show the subpoena would interfere with the normal operation of its business.

Staley moved for reconsideration of the district court order arguing that, inasmuch as its personnel decisions were made pursuant to a bona fide seniority system, it was immune to attack under Title VII pursuant to the Supreme Court's recent decision in *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). Staley further argued that the date which the EEOC inserted in the charge as the date of the discrimination was invalid because it was a mere *pro forma* insertion of the effective date of the Civil Rights Act of 1964. After a hearing on the motion for reconsideration, the court found that *American Tobacco* was not applicable to the present case. The court accepted the testimony of the EEOC attorney that the effective date of the Act had not been inserted in a *pro forma* fashion, but was rather based upon information available to the EEOC. The district court refused to stay its order enforcing the subpoena and Staley filed a timely appeal to this Court.

We note initially that an administrative subpoena will be enforced where: (1) the investigation is within the agency's authority, (2) the subpoena is not too indefinite, and (3) the information requested is reasonably relevant. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981); *EEOC v. University of Pittsburgh*, 643 F.2d 983, 985-86 (3rd Cir. 1981); *EEOC v. University of New Mexico*, 504 F.2d 1296, 1302 (10th Cir. 1974); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). *Compare CAB v. United Air Lines, Inc.*, 542 F.2d 394, 402 (7th Cir. 1976) (information sought amounted to a general warrant; enforcement denied).

This Circuit has long recognized that the EEOC has broad investigatory powers to investigate violations of

Title VII. *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344, 1345-46 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783, 784 (7th Cir. 1971); *See also Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.) *cert. denied*, 400 U.S. 942 (1970); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969). In terms of relevancy, it is sufficient that ". . . the material subpoenaed touches a matter under investigation . . . even though the material may not be considered 'evidence' as the term is employed in the courtroom." *Motorola*, 484 F.2d at 1345 citing *N.L.R.B. v. Rohlen*, 385 F.2d 52, 57 (7th Cir. 1967).

The EEOC need not demonstrate probable cause before it is entitled to information. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312-13 (7th Cir. 1981). In many instances, the purpose of the EEOC investigation is to determine whether probable cause does in fact exist. *EEOC v. Bay Shipbuilding Corp. supra*; *Graniteville Co. v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971); *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783, 784 (7th Cir. 1971).

I

Staley argues initially that the Commissioner's charge fails to meet the statutory requirements of § 706(b) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(b)), contending that the charge is deficient because it fails to demonstrate that the Commissioner had reasonable cause to believe that a violation of the Act had occurred and fails to set forth the facts upon which the charge is based including the dates of the alleged violation. The EEOC responds that the charge meets the statutory requirements of § 706(b) and that the district court did not abuse its discretion in ordering the enforcement of the subpoena.

Our analysis of this issue begins with the statute's language and its legislative history. Congress passed Title VII of the Act to "eliminate discrimination in employ-

ment based upon race, color, religion or natural origin." Senate Judiciary Committee Report No. 872 *reprinted in* 1964 U.S. Code Cong. & Ad. News 2355, 2401. The original Act required the Commissioner to have reasonable cause and to set forth the facts upon which the charge was based:

> Sec. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission *where he has reasonable cause to believe* a violation of this title has occurred (*and such charge sets forth the facts upon which it is based*) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission.

42 U.S.C. § 2000e-5(a) (1970) (emphasis added).

This Circuit considered the statutory requirements of § 706(a) in *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971). In that case, the EEOC sought access to the personnel records of General Employment Enterprises pursuant to §§ 709 and 710 of the Act. General Employment Enterprises argued that the Commissioner's charge failed to set forth the underlying facts with sufficient specificity to be enforced. The charge by the Commissioner alleged that he had reasonable cause to believe that General Employment Enterprises had violated and was continuing to violate the Act by "discriminatorily failing or refusing to hire Negroes and Jewish people." 440 F.2d at 783.

This Court noted:

> Section 706(a) of the Civil Rights Act and Commission regulations (§ 1601.11) require the Commissioner to set forth facts upon which the charge is based. We hold that the Commissioner has satisfied

this requirement by alleging a discriminatory refusal to hire based on present and past employment practices. *Bowaters Southern Paper Corporation v. Equal Employment Opportunity Commission*, 428 F.2d 799 (6th Cir. 1970). *Since a Commissioner's charge does no more than initiate administrative fact finding and voluntary conciliation, we see no reason to impose the pleading standards applicable under the Federal Rules of Civil Procedure.* This is consistent with the broad remedial purposes of the Act which could only be thwarted by sustaining technical defenses of alleged violators.

440 F.2d at 783-84. (emphasis added).

Consistent with the broad, remedial purposes of the Act, other Circuits applied the same liberal standard to charges brought under § 706(a). *See generally Local No. 104, Sheet Metal Workers v. EEOC*, 439 F.2d 237 (9th Cir. 1971). (No detailed pleading of the facts required under § 706(a)); *Graniteville Co. v. EEOC*, 438 F.2d 32, 36-39 (4th Cir. 1971) ("The purpose of the charge under section 706(a) is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case." 438 F.2d at 38); *Bowaters Southern Paper Corp. v. EEOC*, 428 F.2d 799 (6th Cir.) *cert. denied*, 400 U.S. 942 (1970); *South Central Bell Telephone Company v. EEOC*, 314 F. Supp. 349 (E.D. La. 1970).

In 1972, Congress amended § 706(a). The new provision, § 706(b) (42 U.S.C. § 2000e-5(b)), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (*including the date, place and circumstances of the alleged unlawful employment practice*) on such employer, employment agency,

> labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. *Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.*

(emphasis added). Staley argues that § 706(b) as amended imposes new requirements upon a Commissioner's charge: the charge must still demonstrate reasonable cause but additionally, argues Staley, must be made under oath or affirmation and must set forth the date, place and circumstances of the alleged unlawful employment practice. The EEOC argues that § 706(b) lessened the charge requirements under former § 706(a) by eliminating the requirement that the charge demonstrate reasonable cause. Rather, the charge must merely be made under oath or affirmation. The EEOC argues that the charge need no longer state the underlying facts but simply requires notice of the time, place and circumstances of the alleged unlawful employment practice. The EEOC argues that the standard this Court must apply in determining the adequacy of the Commissioner's charge is the standard this Circuit enunciated in *General Employment Enterprises, supra*. As such, argues the EEOC, the Commissioner's charge is valid.

Staley relies upon several recent cases for its argument that the '72 amendments to the Act require the Commissioner to allege sufficient facts to demonstrate some reasonable basis for its charge. In *Shell Oil Co. v. United States EEOC*, 676 F.2d 322 (8th Cir. 1982); *petition for rehearing denied en banc*, 689 F.2d 757, *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-825) the Court of Appeals for the Eighth Circuit held that the "circumstances" language of § 706(b) requires the Commission to allege the "factual basis" of the charge. The Court noted:

> We recognize that one purpose of a Commissioner's charge is to initiate an investigation where an individual is unwilling to file the charge for fear of retaliation by the employer. *Graniteville Co. (Sibley*

> *Div.) v. EEOC*, *supra*, at 39 n.6; 110 CONG. REC. 14186-92 (1964), reprinted in EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3301-12 (1978), *EEOC v. Dean Witter Co.*, *supra*, 643 F.2d at 1339. Therefore, we do not require the Commission to divulge information in the charge which might tend to reveal the identity of an individual who wishes to remain anonymous. But to the extent possible, the Commission should include in the charge the factual basis for the Commissioner's belief that a Title VII violation has occurred.

676 F.2d at 326 (footnote omitted). *See also EEOC v. Appalachian Power Co.*, 13 FEP 1294, 1295 (W.D. Va. 1976), *affirmed for reasons set forth by the District Court*, 568 F.2d 354 (4th Cir. 1978) (oath and affirmation requirement imposes a heavier burden on the Commissioner); *Stewart v. Core Laboratories, Inc.*, 460 F. Supp. 931 (N.D. Tex. 1978).

Other cases, however, strongly reject Staley's argument that the Commissioner's charge must set forth the factual basis upon which the charge is based. In *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334 (9th Cir. 1980), the EEOC charged that Dean Witter had engaged in a "pattern or practice" of discrimination throughout its 37 branches in the recruitment, hiring, assignment, promotion, and terms and conditions of employment of minorities and women. The district court refused to enforce the EEOC subpoena because it was general, unsupported and failed to set forth the date, place and circumstances of the charge as required by the statute. The Court of Appeals affirmed the district court's refusal to enforce the subpoena because the subpoena failed to set forth the date of the alleged unlawful employment practices, but more importantly, found that "the inclusion of the date, place and circumstances requirement [did not] impose onerous new pleading requirements upon the Commission." 643 F.2d at 1337. The Court of Appeals affirmed its earlier holding in *Local 104, Sheet Metal Workers v. EEOC*, 439 F.2d 237

(9th Cir. 1971) where the Court, prior to the '72 amendments, held that § 706(a) of the Act did not require a detailed statement of the underlying facts in the Commissioner's charge.

More recently, the Sixth Circuit in *EEOC v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982) vacated a district court opinion which, inter alia, found that § 706(b) of the Act, as amended, strengthened "the old reasonable cause standard to require sufficient information upon which to base its investigation." 526 F. Supp. 121, 126. The Sixth Circuit examined the standard to be applied in reviewing the Commissioner's charge:

> The purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. In enacting section 706, Congress intended to control 'mere fishing expeditions' by the EEOC. Congress did not intend, however, to allow extensive delay in the disposition of Title VII cases. Title VII was enacted to eliminate discrimination in employment on account of race, color, religion, sex, or national origin. The EEOC was given investigatory power to prevent and remedy discrimination in employment. Requiring the EEOC to justify each charge would divert the EEOC from its primary purpose of determining whether there has been a violation of Title VII.

694 F.2d at 1067-68 (citations omitted). The Sixth Circuit explicitly rejected the Eighth Circuit's holding in *Shell Oil* that the Commissioner's charge must demonstrate some basis in fact:

> We do not agree, however, with the Eighth Circuit's holding in *Shell Oil* that section 706(b) requires 'some basis in fact.' That holding is contrary to well-established law. In subpoena enforcement proceedings, the EEOC usually does not have to prove probable cause or reasonable cause to believe that a charge of discrimination is true.

694 F.2d at 1063 n.7 (citations omitted). *See also EEOC v. Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977) (Reasonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued); *EEOC v. South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir. 1977) ("An agency need not show that the exercise of its jurisdiction is supported by reasonable cause . . ."); *EEOC v. University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974) (subpoena duces tecum enforceable although no probable cause has been shown that the University has violated the Act).

The purpose of this subpoena is to determine whether probable cause exists. To require the EEOC to demonstrate probable cause before the subpoena issues would impose an unfair obligation on the agency. *See EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981) ("The EEOC need make no showing of probable cause to suspect a violation of Title VII unless the employer raises a substantial question that judicial enforcement of the administrative subpoena would be an abusive use of the court's process.") *Accord EEOC v. University of New Mexico, supra.*

Staley also argues that the Commissioner's charge fails to meet the statutory requirements of the Act because the date of the alleged unlawful employment practices is the effective date of the Civil Rights Act of 1964. Staley argues that the EEOC has a policy of *pro forma* insertion of the effective date of the Act in its charges. Staley argues that the failure of the EEOC to state the date of the alleged unlawful employment practices imposes an undue burden upon the employer because the employer has no way to determine the temporal scope of the investigation.

The "date" element of § 706(b) is an important statutory requirement. In *Dean Witter, supra*, the Ninth Circuit noted:

> The dates of the alleged unfair practices bear directly on the relevancy of an EEOC enforcement

> subpoena. By disclosing the dates of the alleged practices under investigation, the EEOC will inform the charged party, as well as the court which is asked to enforce a subpoena, what the proper scope of the investigation should be time-wise. Hopefully, disclosure of the dates at the outset will discourage resistance to discovery by employees fearful of open-ended investigations, and if necessary, will aid the court in determining the relevancy of the matters sought to be subpoenaed.

643 F.2d at 1338. *Accord Shell Oil Co., supra.* The *Dean Witter* court concluded that inasmuch as the EEOC may be uncertain, at the time of the charge, as to the temporal scope of the alleged unlawful employment practices, "a good faith estimate of the time periods should be sufficient." 643 F.2d at 1338. We note further that "the Commissioner's good faith is presumed because of § 706(b)'s oath or affirmation requirement." *EEOC v. K-Mart Corp.*, 694 F.2d at 1064. *Accord Dean Witter, supra.*

In the present case, the district court held a hearing on April 16, 1983 to consider whether the EEOC had a policy of *pro forma* insertion of the effective date of the Act in its charges. After hearing testimony from Staley and the EEOC, the district court accepted the statements of the EEOC that there was no *pro forma* insertion of the effective date of the Act in this case.

The standard of review of factual determinations of a district court in a Title VII case is whether or not they are clearly erroneous. *EEOC v. University of Pittsburgh*, 643 F.2d 983, 985 (3d Cir. 1981) citing *Denicola v. G. C. Murphy Co.*, 562 F.2d 889, 892 (3d Cir. 1977). In this case, the bare, unsupported allegations of Staley's counsel that the EEOC had a policy of inserting *pro forma* the effective date of the Act did not overcome the good faith presumption accorded the Commissioner's selection of a date for the charge. As such, the district court determination, based on the testimony before it, that the effective date of the Act was not *pro forma* inserted in this case is not clearly erroneous.

II

Staley argues that enforcement of the subpoena would be unconscionably burdensome and as such is invalid, contending that the EEOC may investigate only those unlawful employment practices arising within the statutory time period. Staley argues further that inasmuch as Staley has neither hired nor recruited any employees in the relevant job classifications, nor discharged any women employees within the statutory time period, the EEOC cannot investigate those employment practices. Finally, Staley argues that the EEOC may not investigate its job assignment, promotion and transfer decisions for the reason that they are made pursuant to a bona fide seniority system, and that since the EEOC's jurisdiction under Title VII is limited to unlawful employment practices, the EEOC may not investigate its employment practices.

We note initially that the mere assertion by an employer that his employment practices are lawful does not deprive the EEOC of jurisdiction. No action would ever be brought against an employer if the jurisdiction of the EEOC depended upon the assertions of employers as to whether their own employment practices were lawful. Further, the EEOC charge is not merely limited to hiring or firing of employees, but encompasses promotion and training policies. Staley has not shown that there is no basis for the charge as to these policies.

Staley relies upon *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) to support its contention that the EEOC may not investigate job assignment or promotion decisions made pursuant to a bona fide seniority system. In *American Tobacco*, the EEOC and a class of black employees brought a race and sex discrimination case against their employer. The Supreme Court found it necessary to remand the case to the district court to:

> . . . decide whether the lines of progression are part of a seniority system, and if so, whether they are bona fide within the meaning of § 703(h). We decline to reach these issues because, as the court

below noted, their resolution requires additional factual development.

456 U.S. at 77 n.18. Here, we have only the mere assertion by Staley that its employment decisions are effected pursuant to a bona fide seniority system. The purpose of this subpoena is to determine whether such employment decisions are in fact made pursuant to a bona fide seniority system.

Staley is, in essence, attempting to argue the merits of its case at the subpoena enforcement proceeding. But defenses on the merits of an administrative charge may not be raised to block the enforcement of an administrative subpoena. *EEOC v. Bay Shipbuilding Co.*, 668 F.2d 304, 310-11 (7th Cir. 1981) (Agency subpoena enforcement proceedings are of a summary nature), *N.L.R.B. v. Dutch Boy, Inc., Glow Lite Div.*, 606 F.2d 929 (10th Cir. 1979); *N.L.R.B. v. Frederick Cowan and Company, Inc.*, 522 F.2d 26, 28 (2d Cir. 1975) ("The law is clear that a judge passing upon the request for enforcement of a subpoena . . . may undertake only an extremely limited inquiry. No defense relating to the administrative proceedings can be raised, and the agency need not show probable cause to believe the law has been violated."). The district court review of the administrative subpoena and charge here under review was sufficient because it determined that "(1) the investigation was within the agency's authority; (2) the subpoena was not too indefinite and (3) the information sought was reasonably relevant, all as required by *Morton Salt, supra.*" *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981).

Finally, Staley argues that enforcement of the subpoena would be burdensome. The test this Circuit applies to determine whether a subpoena is too burdensome to be enforced is whether ". . . compliance would threaten the normal operation of [Staley's] business." *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d at 313. Here, Staley has made no showing that enforcement of the subpoena would threaten the normal operation of its

business. As such, the district court properly ordered enforcement of the subpoena.

III

Staley also argues that it is entitled to a hearing on the issues to determine whether the subpoena should be enforced, *See EEOC v. Bay Shipbuilding Corp.*, 668 F.2d at 309-311, and that enforcement of the subpoena constitutes an abusive use of the court's process. *Bay Shipbuilding, supra*, at 313.

In *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 311 (7th Cir. 1981), this Circuit indicated that absent a showing that there has been wrongful conduct by the government, some improper purpose by the government, or that the subpoena is intended solely to serve purposes outside of the purview of the jurisdiction of the issuing agency, the district court should enforce a subpoena which meets the three requirements of *Morton Salt*. Staley has failed to demonstrate that the production of information would be burdensome, or that the action has been brought in bad faith merely to harass the employer, *EEOC v. South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir. 1977), or that the investigation was brought for an ulterior purpose, *Bay Shipbuilding, supra*, at 311, or that the subpoena and application for court enforcement were for an improper purpose (the personal vendetta of the EEOC investigator). *EEOC v. First Alabama Bank of Birmingham*, 440 F. Supp. 1381 (N.D. Ala. 1977) *aff'd*, 611 F.2d 132 (5th Cir. 1980). The district court did not err in refusing to hold a factual hearing before enforcing the subpoena.

IV

The district court properly found that the investigation conducted by the EEOC was properly within its authority, that the subpoena was not too indefinite and that the information was reasonably relevant. Because the district court did not abuse its discretion in ordering enforcement of the subpoena, we AFFIRM the holding of the district court.

BAUER, *Circuit Judge*, dissenting. The underlying issue on this appeal is whether the EEOC charge against Staley sets forth sufficient facts to comply with the date, place, and circumstances requirements of section 706(b). Because I believe the charge in this case failed to meet the statutory requirements, I respectfully dissent.

Section 706(b) requires the EEOC to serve a notice of the charge upon the employer; this notice must include "the date, place and circumstances of the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b). In addition to this statutory requirement, EEOC's procedural regulations require that the charge contain a "statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (1981). These requirements are intended to give the employer sufficient notice to challenge an overbroad subpoena, and to protect the employer from open-ended "fishing expeditions." *Shell Oil Co. v. United States EEOC*, 676 F.2d 322 (8th Cir. 1982), *reh'g denied*, 689 F.2d 757, *cert. granted*, 51 U.S.L.W. 3611 (Feb. 22, 1983) (No. 82-825).

Moreover, the EEOC charge is intended to enable the parties to determine whether conciliation may be appropriate, and to aid the courts and the employer in determining what employment material is relevant and discoverable. *See Shell Oil Co., supra*. A charge wholly lacking any basis in fact cannot satisfy these goals. Accordingly, I read section 706(b) to require that the EEOC charge include some factual basis for the agency's belief that an employer has engaged in unlawful employment practices.

The charge brought against Staley consisted of a series of conclusory statements alleging discrimination against women and blacks in virtually every aspect of employment. The charge does not detail any specific instances of discriminatory treatment of employees or applicants. Similarly, the charge fails to describe any of Staley's allegedly discriminatory practices.

Since the charge against Staley failed to include any factual basis for the allegation that Staley had engaged

in unlawful employment practices, I believe that the charge was invalid under section 706(b). An invalid charge, of course, cannot support the issuance of an administrative subpoena. For this reason, I respectfully dissent from the affirmance of the subpoena's enforcement.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EEOC CHARGE NUMBER 051810066

TO: Mr. Donald E. Nordlund
Chairman and President
Q. E. Staley Mfg. Company
2200 East Eldorado Street
Decatur, Illinois 62525

NOTICE OF CHARGE OF DISCRIMINATION WITH COPY OF CHARGE

(See Section 1602.14, EEOC Rules and Regulations, and Section 704(a), Notice of Non-Retaliation on reverse)

You are hereby notified that the attached charge of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et. seq., has been filed against you.

No action is required on your part at this time. However, your attention is directed to:

(1) Section 1601.15 of the Commission's Procedural Regulations which provides that persons charged with employment discrimination, such as yourself, may submit a statement of position or evidence with respect to the allegations contained in this charge. If you wish to submit such information in writing it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communication cannot be made a part of the record;

(2) Section 1602.14 of the Commission's Regulations which requires the preservation of all personnel records relevant to this charge until a final disposition of this charge is made; and

(3) Section 704(a) of the Civil Rights Act which prohibits retaliation.

For future correspondence on this matter, please use the charge number shown above.

Enclosure: Copy of Charge
Date: 10/8/80 Typed name of District Director: Edward D. Kelly

/s/ EDWARD D. KELLY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

COMMISSIONER CHARGE

Pursuant to the authority contained in Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e), *et seq.*, I charge the employer and labor organization listed below with unlawful employment practices occurring at or controlled from the employer's facility:

A.E. Stanley Manufacturing Company
2200 East Eldorado Street
Decatur, Illinois 62525

Allied Industrial Workers of America
Local 837
R.R. #2—Box 177
Assumption, Illinois 62510

I believe that the above employer and labor organization are within the jurisdiction of the Equal Employment Opportunity Commission and have violated, since at least July 2, 1965, and continue through the present to violate Section 703 and Section 707 of the Civil Rights Act of 1964, as amended, by unlawfully discriminating against blacks and women because of their race and/or sex with respect to recruitment, hiring, assignment, promotion, training, termination, and other terms, conditions and benefits of employment.

More specifically, the employer's unlawful discriminatory practices include, but are not limited to:

1. Failing or refusing to recruit and select blacks for all blue collar positions on an equal basis with whites because of their race; failing or refusing to recruit and select women for all blue collar positions, on an equal basis with men because of their sex.

2. Restricting and/or excluding blacks and women from all blue collar positions because of their race and/or sex.

3. Restricting and/or excluding blacks and women from the opportunity to work in all blue collar departments because of their race and/or sex.

4. Failing to provide blacks and women with opportunities for promotion, assignment, and training equal to those afforded to whites and men because of their race and/or sex.

5. Terminating women, because of their sex, at a greater rate than men.

6. Maintaining discriminatory policies and practices and other terms and conditions of employment which operate to disadvantage blacks and women because of their race and/or sex.

Specific unlawful employment practices engaged in by both the employer and the labor organization include, but are not limited to, maintaining seniority, posting, and bidding systems as well as other systems contained in the collective bargaining agreement which operate to perpetuate the effects of the employer's discriminatory hiring, assignment, promotion and training policies.

The persons aggrieved include all blacks and women who have been, continue to be, or may in the future be adversely affected by the unlawful practices complained of herein.

District of Columbia, ss:

I, Daniel Leach, being duly sworn, depose and say that I am a Commissioner of the Equal Employment Opportunity Commission and that I have cause to believe that A.E. Staley Manufacturing Company and Allied Industrial Workers of America, Local 837, have committed the unlawful employment practices set forth in the foregoing charge.

_____

Commissioner

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30th DAY OF SEPTEMBER 1980.

_____

Notary Public

My Commission expires 31 October 1984.

(Letterhead Winston & Strawn)

December 17, 1980

Ms. Shirley Ellis
Supervisor
Equal Employment Opportunity
Commission
55 East Jackson, Room 1401
Chicago, Illinois 60604

RE: Leach v. A. E. Staley
Charge No. 051810066

Dear Ms. Ellis:

Please be advised that we represent Respondent, A. E. Staley, in the above-referenced matter. As such, we are in receipt of the Commissioner's Charge and your Request for Information. In order to determine the relevant basis of your inquiries and adequately respond to that request, we request the following information:

1. The basis for Commissioner Leach's belief that A. E. Staley fails or refuses to recruit and select blacks and females for blue collar positions on an equal basis with whites and men on account of race or sex;

2. The basis for the Commissioner's belief that A. E. Staley restricts and/or excludes blacks and women from all blue collar positions because of their race and/or sex;

3. The basis for the Commissioner's belief that A. E. Staley restricts and/or excludes blacks and women from the opportunity to work in all blue collar departments because of their race and/or sex;

4. The basis for the Commissioner's belief that the Company fails to provide blacks and women with equal promotion, assignment and training opportunities on account of their race, and/or sex;

5. The basis for the Commissioner's belief that A. E. Staley terminates women at a greater rate than men because of their sex; and

6. The basis for the Commissioner's belief that the Company maintains discriminatory policies, practices and other terms and conditions of employment which operate to disadvantage blacks and women because of their race and/or sex.

Upon receipt of this information we will be able to respond to your Request for Information. We look forward to working with you and your agency in this matter. We are sure that, upon completion of a fair and proper review, the Commission will conclude that there is no reasonable cause to believe that A. E. Staley engages in unlawful employment practices and that it will withdraw the charge.

Please direct all future correspondence in this matter to Gerald C. Peterson or to the undersigned.

Very truly yours,

C. R. Gangemi, Jr.

(Letterhead Winston & Strawn)

January 15, 1981

Ms. Shirley Ellis
Equal Employment Opportunity
Commission
55 East Jackson Boulevard
Room 1401
Chicago, Illinois 60604

RE: Leach v. A. E. Staley
Charge No. 051810066

Dear Ms. Ellis:

We are in receipt of your letter of December 31, 1980 which was in response to our letter of December 17. Apparently, the intent of our letter was not clear in that, without waiver of any rights, we do not seek to invade the thought processes of Commissioner Leach.

As we indicated to Mr. Pressman of your office in a telephone conversation on December 23, 1980, we are merely requesting a statement of the facts or data upon which Commissioner Leach determined that he believed A. E. Staley is in violation of the law.

In light of the seriousness of the charge and the time and effort which will have to be expended on the part of A. E. Staley, this is hardly an unreasonable request. This is particularly so in that Staley is unaware of any evidence or data upon which such a charge could reasonably be based.

Consequently, we ask that you reconsider your position and furnish us with the information requested in order that this matter may proceed in a cooperative and expeditious manner.

In this regard we remain ready and willing to meet with you and your staff at your convenience to answer any appropriate questions and to iron out any differences.

Very truly yours,

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SUBPOENA

No. CH-81-12

TO: Mr. Donald Nordlund, Chairman
A. E. Staley Manufacturing Company
2200 East Eldorado Street
Decatur, Illinois 62525

In The Matter Of

Commissioner Daniel Leach

v.

A. E. Staley Manufacturing Company

Charge No. 051810066

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ *Testify before:*

☐ *Produce and bring the documents described below:*

☐ *Provide access to the evidence described below for the purpose of examination or copying to:*

Shirley Ellis of the Equal Employment Opportunity Commission at 55 E. Jackson Blvd., Room 1401, Chicago, Illinois on March 2, 1981 at 10:00 a.m. o'clock of that day.

The evidence required is: All documents within the possession or control of the Company which constitute, provide, state, describe, detail, denote, refer to, pertain to, list or explain any of the information requested with regard to the areas of inquiry in Attachment 1.

If the addressee intends not to comply with this subpoena, see the applicable portion of Section 1601.16 of the Commission's Procedural Regulations (reprinted on reverse) for guidance.

/s/ EDWARD D. KELLY
Edward D. Kelly
Acting District Director
EEOC-Chicago District Office
55 East Jackson Boulevard
Room 1401
Chicago, Illinois 60604

Date: 2/17/81

For purposes of this subpoena each numbered item shall apply to all employees, positions and departments in all facilities of the Company in Decatur, Illinois and to all predecessor facilities, departments, employees and positions performing similiar functions, at any time since January 1, 1978 to the present, unless otherwise indicated.

Each item is to be answered separately as to each year beginning January 1, 1978, to the present unless otherwise indicated.

Unless a contrary meaning appears, the following definitions apply:

a. *"Employee"* refers to any person, including all officers, executives, managers, supervisors, and professionals who are employed by the Company on a full or part-time basis and on a temporary or permanent basis.

b. *"Job Title"* and *"Job"* refer to the descriptive names given by the Company to the positions held by its employees.

c. *"Job Group"* refers to the Company's classification of jobs having similiar content, wage rates and opportunities.

d. *"EEO-1 Category"* refers to those job categories used on the EEO-1 Employer Information Report.

e. *"Applicant"* refers to any person seeking permanent, full time, or temporary employment at the Company and includes, but is not limited to walk-in applicants and all persons whose names are referred to the Company by employment agencies or any other recruiting sources, whether such persons referred are interviewed or not.

f. *"Hire"* refers to any hire or rehire for permanent, temporary, full-time or part-time employment; it does not include a recall, reinstatement or transfer from another Company facility.

g. *"Promotion"* refers to any permanent change from one job title to another with a higher maxium rate of pay.

h. *"Transfer"* refers to any permanent change from one job title to another, and to lateral movement from one department to another, with or without a change in job title, which is not a promotion as defined in above.

i. *"Document"* or *"Documents"* means any writing or record of any type or description, including but not limited to the original and any nonidentical copy, regardless of origin or location, of any correspondence, records, tables, charts, analyses, graphs, schedules, reports, memoranda, notes, diaries, letters, telegrams, messages (including, but not limited to, reports or telephone conversations and conferences), studies, books, periodicals, magazines, booklets, circulars, bulletins, instructions, minutes, other communications, (including but not limited to, inter and intra-office communications), purchase orders, bills of lading, bid tabulations, questionnaires, surveys, contracts, options to purchase, memoranda of agreements, assignments, licenses, grievances, arbitration, submissions, arbitration decisions, books of account, orders, order acknowledgements, invoices, statements, bills, checks, vouchers, notebooks, data sheets, data processing cards, computer printouts (and/or any machine recorded source from which these may be produced), photographs, photographic negatives, phone records, tape recordings, wire recordings, transcripts of recordings, drawings, catalogues, brochures, all other data compilations.

j. *"Tests"* refers to any paper and pencil or performance measure used as a basis for any employment decision including, but not limited to, any measure of general intelligence, knowledge, specific intellectual abilities, physical abilities, mechanical, clerical, or other aptitudes, dexterity and coordination, knowledge and proficiency, occupational and other interests, attitudes and personality.

k. *"Department"* refers to any functional unit, division, branch, or section into which employes are grouped or organized by the Company.

l. *"Facility"* refers to the Company's business operations at one location.

m. *"Blue Collar"* refers to all jobs which the Company designates as being within the EEO-1 categories of Craft, Operative, Laborer, Service.

1. For each facility in Illinois:

a. name, address, telephone number;

b. the dates during which it has been in operation;

c. whether the operation has been discontinued and, if so, the date of its termination;

d. the name, title and telephone number of the senior official;

e. the total number of employees.

2. The nature of the Company's business and the principal products manufactured, processed, or produced by the Company.

3. With regard to a parent corporation which owns or controls the Company in whole or in part: its name, address and telephone number.

4. For each subsidiary of the Company: its name and address.

5. For each employee responsible for any part of the recruitment, hiring, assignment, promotion, transfer and training processes, including, but not limited to, the decision to make a hire; the decision as to what sources are used for recruitment; initial screening; interviewing; making recommendations for hire and assignment; making the decision for the hire and

assignment; recommending a promotion or transfer; making the final decision to promote or transfer; recommending training, selecting for training:

a. name, race, sex, job title, department, date of hire, current business address;

6. The participation of each union, separately, in the recruitment, promotion, upgrading, transfer, training, or layoff of employees in ways not specified in the collective bargaining contract(s).

7. The organization of the Company including:

a. all sections, departments, divisions or other subgroups;

b. the lines of authority and job progressions among all such units;

c. the name and job title of the person in charge of each group and subgroup.

8. For each section, department, division, and/or other subgroup listed in response to Item 7, above:

a. a summary listing of all job titles within each such unit;

b. the official and manager positions in order of authority and other job titles by the wage rate or salary level, within EEO-1 category;

c. for each job title, the job code, method of compensation (e.g.; hourly, bi-weekly, weekly), salary grade or level and range for salaried employees or if there is no established range for the job the actual salary range of persons in the job, and wage rate or labor grade for hourly employees;

d. total number of full time permanent employees (on a consistent date for each year) and the sex and race identification of those employees.

9. For each job title within units listed in response to item 8, above, the total number of:

a. permanent, part time employees and the race and sex of those employees;

b. temporary employees, and the race and sex of those employees.

10. The complete Affirmative Action Program and support data for 1980.

11. The Company forms, manuals, memoranda and plans listed below, and the period of time during which each was in effect/use:

a. all forms used in the application and hiring process, including but not limited to, applications, applicant evaluation forms and interview forms;

b. all other personnel-related forms, including, but not limited to those used for transfer requests, job bids, training, promotion, pay change, performance evaluation, termination;

c. all manuals of personnel procedures (such as employee handbooks, supervisor's manuals, manuals of personnel policies and procedures, and complaint or grievance policies), including but not limited to sections relating to selection criteria, hiring, assignment, promotion, transfer, evaluation, testing, placement and training, not supplied in response to Subpoena CH-81-13 (Charge No. 051782601);

d. all written memoranda which, at least in part, describe Company personel policies and procedures;

e. salary administration plans, including description and listing of salary groups, labor grades and salary ranges and the job titles and job codes included in each such group, grade, range.

12. Each collective bargaining agreement in effect at any time from January, 1977 to the present.

13. The summary data as of March 31, 1980 which was used to complete the 1980 EEO-1 Employer Information Report, and:

a. for each year since 1978, the job titles included in each EEO-1 category, and the job titles which have been reported in different EEO-1 job categories for different years, by category and year.

14. Any reports regularly or specifically prepared by the Company on personnel related activities, such as reports on the number of persons hired, transferred, promoted or terminated, reports concerning employee turnover and projections of future hiring, or reports compiled for internal EEO purposes, and for each such report:

a. the name and title of the person responsible for each report;

b. the records used to prepare the reports, and the period of time for which they are maintained;

c. the name of the person(s) who is the custodian of the records described above and the physical location of these records.

15. With respect to all blue collar jobs:

a. procedures followed in the hiring of employees and/or in placing employes in an initial job assignment;

b. the Personnel Department's specific responsibilities regarding hiring and job assignment;

c. the specific responsibilities of the other departments, and, if there are differences because of the department involved, the reasons for such differences.

16. With respect to all blue collar jobs, for each job title listed in response to Item 8, above:

a. a job description of the position (to the extent that written job description are available for any particular job) detailing all components of the job;

b. the minimum qualifications used as the basis for hiring, promotion, transfer or other employment decisions for that job title, including, but not limited to, education, skill, experience, test performance;

c. the weight accorded each of the above qualifications in each type of employment decision referred to in (b) above.

17. Any written criteria or standard used for blue collar jobs in connection with hiring, job assignment, promotion, and transfer, including standards and procedures to be used by interviewers in evaluating candidates, other than those provided in response to Item 16 above.

18. The name and description of all paper and pencil, or formal performance measures (hereinafter "test") used for blue collar jobs in connection with hiring, placement, proficiency, merit, promotion, transfer and training decisions and the job title(s) for which each is used.

19. A copy of each test.

20. For each test identified in Item 18 above:

a. any validation study which was done and whether the validation was in accordance with EEOC Uniform Guidelines on Employee Selection Procedure;

b. the date of each such study;

c. the results of each such study;

d. the name and address of the person or organization conducting each study;

e. a copy of each study including all relevant documents and attachments.

21. A description of all records and reports that are maintained by the Company or maintained elsewhere pertaining to the Company, other than those supplied in response to Item 14, above, including all the information on the record and report and whether race and sex are indicated, concerning:

a. applicants and hires, including but not limited to applicant logs, applications, interview records, initial assignment records, and summary reports of applicants and/or hires;

b. summarized and/or individual information on:

- persons who sought promotion and transfer;
- persons selected for promotion and transfer,
- reasons for selection or non-selection of persons for promotion or transfer;
- persons identified by the Company as "promotable";

c. information on individual employees' personnel history including but not limited to job, salary/wage, location, status changes, and reasons for separation.

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the Matter of

Commissioner Daniel Leach, *Charging Party,* *v.* A. E. Staley Manufacturing Company, *Respondent.*	Subpoena No. CH-81-12 Charge No. 051810066

PETITION TO REVOKE SUBPOENA

Respondent, A. E. Staley Manufacturing Company, by its attorneys C. R. Gangemi, Jr. and Gerald C. Peterson, pursuant to Rule 1601.16(b) of the Commission's Rules, hereby petitions the General Counsel to revoke the above-referenced subpoena. In support thereof Respondent states:

1. The charge is invalid in that it fails to allege that Commissioner Leach had a good faith and reasonable belief for his conclusion that the Company is in violation of the Act.

2. The charge is invalid in that it fails to allege either specific evidence of an existing violation or that reasonable legislative or administrative standards for conducting an investigation are satisfied with respect to Respondent.

3. The charge is invalid in that it fails to make a good faith estimate of the probable time periods of the alleged violation.

4. To the extent that the Subpoena seeks information regarding Respondent's practices prior to March 30, 1980, it is unduly burdensome, in that it seeks information immaterial to a proper charge.

5. To the extent that Subpoena seeks information regarding any of Respondent's facilities aside from its Decatur facility or those controlled by Decatur, it is unduly burdensome in that such information is beyond the scope of the charge.

For any and all of the above-stated reasons, Respondent objects the Subpoena in its entirety and to each item listed therein, and requests that the Subpoena be revoked.

A. E. STALEY MANUFACTURING COMPANY

By_____

C. R. Gangemi, Jr.
Gerald C. Peterson
Its Attorneys

OF COUNSEL:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

Chicago District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
55 East Jackson Boulevard, Room 1401
Chicago, Illinois 60604

IN THE MATTER OF

Commissioner Daniel Leach, *Charging Party,* *vs.* A. E. Staley Manufacturing Co., *Respondent.*	Charge No. 051810066 Subpoena No. CH-81-12

Addressee: Mr. Donald Nordlund, Chairman
A.E. Staley Manufacturing Company
2200 East Eldorado Street
Decatur, Illinois 62525

DETERMINATION OF PETITION TO REVOKE OR MODIFY SUBPOENA

Under the authority vested in me by 29 C.F.R. § 1601.16, I hereby issue the following Determination of Respondent's petition to revoke or modify the subpoena issued in the investigation of the subject charge.

Background

On September 30, 1981, Daniel Leach, a Commissioner of the Equal Employment Opportunity Commission ("EEOC"), filed a charge in which he stated that he believed that A.E. Staley Manufacturing Company ("Staley") had committed unlawful employment practices at its facilities located in Decatur, Illinois.[1] The Chicago District Office received the charge on

[1] Charge attached as Exhibit 1.

October 6, 1980 and assigned to it number 051810066. The charge was deferred to the Illinois Department of Human Rights on October 7, 1980 and pursuant to the work sharing agreement between IDHR and EEOC, was returned to EEOC for investigation and filing. EEOC filed the charge on October 8, 1980. The charge was served on Staley and on November 5, 1980, the EEOC sent a first request for information.[2] A meeting was shceduled for November 24, 1981, to discuss the form in which this information was to be submitted. Despite this meeting, and the subsequent exchange of several letters and the production of some documents, the Commission never received from the Respondent all of the information it had requested. Finally, a subpoena was served on Staley on February 17, 1981.[3] Staley filed a timely petition to revoke the subpoena.[4]

I. PETITION

Staley objects to the subpoena because the *charge* fails to allege that the Commission had a good faith and reasonable belief that Staley was in violation of Title VII.

DETERMINATION

The petition is denied. Jurisdicion of the charge is not a matter of inquiry in deciding whether a subpoena must be honored. *EEOC v. Gas Institute of Technology,* 23 FEP 825 (N.D. Ill. 1980). Further, inquiry into the reasons why the Commission initiates a law suit or, as in this case, an investigation is neither proper or relevant. *U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 1,* 438 F.2d 679 (7th Cir. 1971); *Jones v. Holy Cross Hospital Silver Spring, Inc.,* 64 F.R.D. 586 (D. Md. 1974).

II. PETITION

Staley objects to the *charge* in that it fails to allege any evidence of a violation or that reasonable standards for conducting an investigation are satisfied.

---

[2] Information request attached as Exhibit 2.

[3] Subpoena attached as Exhibit 3.

[4] Petition attached as Exhibit 4.

DETERMINATION

Again, the jurisdiction of the EEOC to investigate is not a matter of inquiry at this time. *Gas Institute of Technology, supra.* Further, courts have uniformly held that a commissioner's charge is valid if it identifies the parties and describes generally the action or practices complained of and that the Commission need not assert evidence in the charge. *General Employment Enterprises, Inc. v. EEOC,* 440 F.2d 783 (7th Cir. 1971); *New Orleans Public Service, Inc. v. Brown,* 507 F.2d 160 (5th Cir. 1975). The petition is denied.

III. PETITION

Staley objects to the subpoena in that the *charge* fails to make a good faith estimate of the probable time periods of the violation.

DETERMINATION

Assuming that Staley means that the Commission's designation of July 2, 1965 is not a "good faith estimate" of the violation, the petition is denied. It is well founded that inquiry into employment practices may extend even to practices *prior* to the effective date of Title VII. *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974). Further, the fact that designation of July 2, 1965 was made under oath is sufficient to show "good faith." *EEOC v. Dean Witter Co., Inc.,* 621 F.2d 1012 (9th Cir. 1980).

IV. PETITION

Staley objects to the *subpoena* in that it seeks information prior to 180 days before the Commission signed the charge and that this is burdensome to Staley.

DETERMINATION

The petition is denied. The Commission is empowered to investigate this charge, which alleges violations beginning with the effective date of the Act. There are no time limitations on the extent of this investigation. See generally, *Pettway, supra; Dean Witter, supra.* Further, expense, time, and burdensomeness to a respondent are inherent in these types of investigations, *H. Kessler Co. v. EEOC,* 53 F.R.D. 330 (N.D. Ga. 1971), aff'd 468 F.2d 25 (5th Cir. 1972), and the mere assertion of burdensomeness is insufficient to revoke or modify a subpoena. *New Orleans Public Service, Inc. v. Brown, supra.*

V. PETITION

Staley objects to that portion of the subpoena seeking information on facilities other than the Decatur facility or those controlled by Decatur because it is "unduly burdensome" and is beyond the scope of the charge.

DETERMINATION

The petition is denied. As to undue burdensomeness, Staley has made no showing other than the assertion. That is clearly not enough to modify or revoke a subpoena. See *New Orleans Public Service, Inc. v. Brown, supra.* As to the "scope of the charge," while jurisdiction is not a matter for judicial scrutiny at this time, in this case the charge is directed at Staley's corporate headquarters and those operations related thereto. It is difficult to imagine a facility of a corporation which was not controlled by the corporate headquarters. In any event, the question of control is an issue of fact, and hence properly subject to investigation.

For the reasons stated above, Staley's Petition to Revoke is denied. Respondent is directed to produce the documents subpoenaed to Shirley Ellis, Supervisory EOS, at the offices of the EEOC, 55 East Jackson Boulevard, Room 1401, Chicago, Illinois 60604, at 9:30 A.M., April 21, 1981.

/s/ EDWARD D. KELLY
Edward D. Kelly
Acting Director

Chicago District Office
Equal Employment Opportunity
Commission
55 East Jackson Boulevard,
Room 1401
Chicago, Illinois 60604

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the Matter of

Commissioner Daniel Leach, *Charging Party,* *v.* A. E. Staley Manufacturing Company, *Respondent.*	Charge No. 051810066 Subpoena No. CH-81-12

APPEAL OF PETITION TO REVOKE OR MODIFY SUBPOENA

C. R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for A. E. STALEY MANUFACTURING COMPANY

OF COUNSEL:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the Matter of

Commissioner Daniel Leach,
Charging Party,

v.

A. E. Staley Manufacturing Company,
Respondent.

Charge No. 051810066
Subpoena No. CH-81-12

APPEAL OF PETITION TO REVOKE OR MODIFY SUBPOENA

Respondent, A. E. STALEY MANUFACTURING COMPANY ("A. E. Staley" or the "Company"), by its attorneys C. R. Gangemi, Jr. and Gerald C. Peterson, pursuant to Rule 1601.16(b) of the Commission's Rules, hereby appeals the Determination of Petition to Revoke or Modify Subpoena (Attachment "C") in the above-referenced matter.

As grounds for its appeal Respondent states:

1-5. Respondent reasserts the grounds set forth in its Petition to Revoke Subpoena (Attachment "B").

6. On April 17, 1981 Respondent was served with the undated Determination of Petition to Revoke or Modify Subpoena issued by Edward D. Kelly, Acting Director for the Equal Employment Opportunity Commission's Chicago District Office.

7. Respondent excepts to the Acting Director's Determination in that he failed to grant Respondent's requested relief. In addition, Respondent takes exception to the following erroneous rulings of fact, law and/or policy:

a. To the finding that A. E. Staley objected to the charge because the *Commission* failed to allege a good faith and reasonable belief that the Company was in violation of Title VII in that this finding misstates the grounds for Staley's objection;

b. To the holding (Determination I) that jurisdiction of the charge is not a matter of inquiry in deciding whether a subpoena must be honored in that the holding is based upon an erroneous finding of fact (see above) and is contrary to established law;

c. To the holding (Determination I) that inquiry into the reasons why the Commission initiates an investigation is neither proper or relevant in that it is contrary to applicable law;

d. To Determination II in that it is contrary to applicable law and Commission policy and misstates the findings of the cases cited therein;

e. To Determination III in that it is contrary to applicable law and misstates the holding in *EEOC v. Dean Witter Co., Inc.*, 621 F.2d 1012 (9th Cir. 1980);

f. To Determination IV in that it is contrary to applicable law;

g. To Determination V in that it is contrary to the Acting Director's own finding of fact and is contrary to applicable law and Commission policy.

WHEREFORE, Respondent requests that the Determination of Petition to Revoke or Modify Subpoena be set aside, that the Subpoena be revoked, and that Commissioner Leach's charge be dismissed as invalid.

A. E. Staley Manufacturing Company

By /s/ GERALD C. PETERSON

C. R. Gangemi, Jr.
Gerald C. Peterson
Its Attorneys

OF COUNSEL

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

(Letterhead Winston & Strawn)

July 24, 1981

Mr. Edward D. Kelly
Acting Director
Equal Employment Opportunity Commission
Chicago District Office
55 East Jackson Boulevard
Room 1401
Chicago, Illinois 60604

RE: Leach v. A. E. Staley Manufacturing Company
EEOC Charge No. 051810066

Dear Sir:

A. E. Staley Manufacturing Company ("Staley" or the "Company"), without waiver of any right to challenge the validity or scope of the above-referenced charge or the subpoena issued in connection therewith, and without waiver of any right to challenge the legality of proceedings conducted by the Equal Employment Opportunity Commission ("EEOC" or "Commission"), hereby submits its statement of position pursuant to § 1601.15 of the Commission's regulations.

STATEMENT OF POSITION

I.

INTRODUCTION

A. E. Staley Manufacturing Company was founded in 1898 by Mr. A. E. Staley, Sr. The Company is headquartered at 2200 Eldorado Street, Decatur, Illinois, where it also maintains its largest manufacturing facility. Staley, one of the world's

leading processors of corn and soybeans, manufactures over 600 varieties of corn sweeteners, starches, vegetable proteins and oils, nutrients, flavorings, adhesives and specialty chemicals, feed ingredients and animal feed supplements. Since 1922, moreover, the Company has pioneered the American soybean processing industry. Staley, thus, serves a broad range of food and industrial markets as well as agricultural and consumer needs.

Staley is an Equal Opportunity Employer firmly committed to providing employment and terms and conditions of such employment without regard to race or sex. As such, its corporate policy (*See* Exhibit 1) is as follows:

> At Staley our policy is to provide equal opportunity to all people. We do not consider race, color, sex. . . as qualifying or disqualifying factors in the selection, development, and promotion of employees.

This policy is also set forth in the collective bargaining agreement between Staley and the Allied Industrial Workers of America, AFL-CIO, Local #897 ("AIW" or the "Union"), which represents the blue-collar employees at the Decatur facility Article I §5 of the agreement provides:

> The Company and Union agree to the policy that applicants will be hired and employees will be treated without discrimination on the basis of race . . . [or] sex. . .as provided by law. (Exhibit #2; hereinafter the "Contract").

In addition, Staley and its employees have a continuing commitment to community action programs geared to equal opportunity. Its employees participate in such public affairs and community service organizations as the Decatur Public School Board, the Decatur Boys Club, the United Way of Decatur and Macon County, the Legal Aid Society, Planned Parenthood, the Decatur Human Relations Commission, the Experience Based Career Education Program, and the Advisory Board to the Decatur Vocational School.

The Company contributes financial support to the Decatur Human Relations Commission, the Decatur Chapter of the N.A.A.C.P., the Community Health Improvement Center, the Boys Club of Decatur, the Decatur Macon County Opportunities Corporation and other institutions and organizations which support and benefit minorities and women.

Notwithstanding the above, on September 30, 1980 EEOC Commissioner, Daniel Leach filed a purported charge with the Commission against the Company. Commissioner Leach alleged that he believed that Staley, since July 2, 1965 and continuing, has discriminated against black and female "blue-collar" employees and applicants for such employment at the Decatur facility on account of their race or sex.

Commissioner Leach did not allege that he had a *reasonable basis* for his belief that Staley violated Title VII although such an allegation is mandated by the *Act. Graniteville Company* v. *EEOC,* 438 F.2d 32, 41 (4th Cir. 1971). *See also, Marshall* v. *Barlow's Inc.,* 436 U. S. 307 (1978); *U.S.* v. *Mississippi Power & Light Co.,* F.2d , No. 50 *Daily Labor Report* D-1 (BNA, March 16, 1981) (5th Cir. 1981). Nor did Commissioner Leach allege that Staley satisfied any of the criteria under which the Commission has stated it will issue Commissioners' charges. *See,* EEOC Bulletin of March 20, 1978, CCH Employment Practices Vol. 2 *"New Developments"* ¶ 5062 and statement of Chair Norton to House Oversight Committee on July 27, 1977 (42 F. R. 42021 Appendix B). Consequently, the purported charge is invalid as a matter of law.

Moreover, despite repeated requests by Staley, the Commission has flatly refused to provide any explanation whatsoever of any alleged factual basis for the charge and the massive investigation engendered thereby.

II.

COMMISSIONER'S ALLEGATIONS

By his purported charge, Commissioner Leach has alleged that he believes Staley discriminates against black and female blue-collar employees and applicants for such employment at its Decatur facility by: (1) failing to recruit and select blacks and women on an equal basis with white males; (2) restricting or excluding blacks and women from certain positions; (3) restricting or excluding blacks and women from certain departments; and (4) failing to provide blacks and women with equal opportunities for promotion, assignment and training. In addition, the Commissioner alleged that he believes Staley terminates its female workers at a greater rate than men.

As previously noted, none of these allegations are based upon an assertion that Commissioner Leach has a reasonable belief that they are true, nor are they supported by any facts from which a reasonable basis for their belief could be inferred. The purported charge is nothing more than an amalgam of conclusory allegations without basis in fact.

The charge, moreover, underscores a grave misunderstanding of the meaning of equal opportunity employment. The purpose of equal opportunity employment is to make qualifications the controlling factor in employment decisions. *Griggs v. Duke Power Co.*, 401 U.S.424 (1971). Thus, it assures, employers, employees and consumers efficient and trustworthy workmanship through fair and neutral employment and personnel decisions. *McDonnell Douglas v. Green*, 411 U.S.792 (1973).

Title VII of the 1964 Civil Rights Act, *as amended* (42 U.S.C. 2000e *et seq*) does not guarantee a job to every person regardless of qualifications nor does it require that the less qualified be preferred over the better qualified simply because of protected class status. *Griggs v. Duke Power Co., supra.*

Indeed, any preferential treatment based upon minority status or sex is forbidden by Title VII.

Title VII is not intended to diminish traditional management perogatives. *Steelworkers v. Weber,* 443 U.S. 193, 207 (1979), nor does it require an employer to restructure its employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp. v. Waters,* 438 U.S.567 (1978). Under Title VII an employer retains its inherent management right to choose from among qualified candidates, those persons it deems best suited for a job. *Texas v. Burdine,* _____ U.S. _____, ____ LW____(1981).

A review of Commissioner Leach's allegations in light of the above-stated principles establishes that they are without a legal basis.

A. *Recruitment and Hiring:* Commissioner Leach alleges that he believes Staley fails to recruit and select black and female applicants for blue-collar employment on an equal basis with white males. In that the Company has recruited no applicants for permanent blue-collar positions since November, 1979 and has hired no applicants since March 3, 1980 (See affidavit of Hulen F. Jenkins attached hereto as Exhibit #3), Commissioner Leach's charge, filed on September 30, 1980 is untimely as a matter of law, *United Air Lines v. Evans,* 431 U.S. 553, 558 (1977), and cannot serve as the basis for a Commission investigation. 42 U.S.C. §2000e-8.

Commissioner Leach does not state whether Staley's alleged failure to recruit and select blacks and females is based on an intent to discriminate or is the result of neutral employment practices which have a disparate impact on blacks and females. In either event the charge is meritless.

Staley recruits its blue-collar work force from the Decatur Standard Metropolitan Statisical Area. According to data prepared by the United States Department of Labor in July, 1979, blacks account for 7.9% of the population and 8.9% of the

labor force in that area. The availability of women for blue-collar jobs of the kind found at the Company is estimated at 9.1%.

Staley recruits its blue-collar work force by placing advertisements in local newspapers, including newspapers geared toward minority readership and by notifying the Illinois Employment Service. These advertisements state that the Company is an Equal Opportunity Employer and announces the times and places that applications will be received. Application forms (Exhibit #4) are screened for completeness by a Company representative. The application form states that Staley is "An Equal Opportunity and Affirmative Action Employer M/F". No racially identifiable data is sought on the application. The applications are then reviewed and kept on file for a six-month period and are used in the event that a job opening arises.

When a job opening arises, those applicants whose backgrounds appear to meet job requirements are scheduled to interview with representatives of the Company. The interviews are based upon neutral, objective criteria such as the applicant's prior related experience, ability to learn on the job, and prior absenteeism record (Exhibit #5). The applicants are not given any tests. At the conclusion of the interview, candidates are advised that they will be contacted if selected to fill a job opening. The Company then performs reference checks and job offers are made.

From January, 1979 through March 3, 1980, Staley hired 77 permanent blue-collar employees under the above-described recruitment and selection process. Thirteen (16.9%) of these employees are black and 16 (20.8%) are female. In that all applicants must go through this process and there is no allegation that qualified blacks or women were denied a job, no inference of disparate treatment can be drawn from Staley's

hiring process. *See e.g., Furnco Construction Corp. v. Waters, supra; McDonnell Douglas v. Green, supra.*

In addition, because the percentages of blacks and females hired far exceeded their availability, no inference of disparate impact is proper. *See e.g., Hazelwood School District v. U.S.*, 433 U.S. 299 (1977). Consequently, the allegation of discriminatory recruitment and hiring has no basis in fact or law.

A. *Job Assignments:* Blue-collar job assignments at Staley are made in accordance with the terms of the Contract between the Company and the Union. The terms of that Contract are applicable to all employees without regard to race or sex.

Pursuant to the Contract, all employees are hired as "Extra Board" (labor pool) workers. Employees in this classification may be assigned, in accordance with the terms of the Contract, to an opening in any department or job in the plant. Article VIII § 4 of the Contract provides:

> Jobs for Extra Board employees for the first shift shall be filled in order of plant seniority. Second shift jobs shall be filled next in the order of plant seniority and third shift jobs last. Extra Board employees shall have no right to select the department in which they will work.
>
> • • •
>
> Extra Board employees assigned to the same department and shift shall be placed on the vacant job in accordance with their plant seniority and the department's "Ranking List for Step-Up Assignments". (See *infra.*)

Thus, under the Contract, Extra Board employees are assigned to job vacancies as they arise solely on the basis of their seniority. Moreover, if two Extra Board employees are assigned to the same department, the worker with greater seniority will have the choice of jobs.

Seniority, likewise, determines an employee's right to bid for and obtain a permanent job classification. Thus, Article IV, § 18 of the Contract provides that plant seniority determines:

(a) Order of lay-off and recall in reduction of force from the plant;

(b) Preference in obtaining jobs and shift open to plant-wide bid if the bidder can qualify; and

(c) Preference in Extra Board clearances.

Article IV, § 2B of the Contract provides that Department seniority determines:

(a) Order of lay-off and recall in reductions of force from the department;

(b) Preference in obtaining jobs and shifts open for bid in the department; and

(c) Preference in step-ups, displacement and bumping.

Under this seniority agreement, an employee may hold only one regular job title at a time. When a vacancy occurs, when new jobs are created, when the rate or starting time of a job is changed, or when the job specifications are materially altered, such jobs are posted in the department in which the opening occurs.

If the jobs are not filled on the basis of departmental seniority, they will be posted for plant-wide bidding. Any employee may bid for any job title open to plant-wide bid unless, the employee has already successfuly bid on three such openings in a contract year (this restriction is not applicable to newly created jobs).

Again, this seniority system is facially neutral and applies equally to all employees without regard to race or sex. Under *Teamsters v. U.S.*, 431 U.S. 324 (1977) and *United Air Lines,*

the system is fully protected by the Act. Indeed, Commissioner Leach has not alleged that the seniority system is unlawful.

Not only is the seniority system non-discriminatory on its face, it is non-discriminatory in application. As of March 3, 1980, Staley employed workers in 14 labor grades (wage rates) in 45 departments (including Extra Board). Black employees were represented in all labor grades and 42 of the 44 permanent departments.

Labor Grade	Distribution of Black Employees
A	7.6%
B	8.3%
C	4.5%
D	.7%
E	11.4%
F	7.6%
G	5.3%
H	18.9%
I	8.3%
J	10.6%
K	6.1%
L	1.5%
M	4.5%
N	4.5%

Thus, 35.5% of all black employees are in the skilled employee labor grades (I-N), while only 20.4% of the black employees are in the unskilled or lesser skilled labor grades (A-C).

Because seniority is the controlling factor in all permanent job assignments, no employee hired after November 22, 1974 had achieved a position in the highly-skilled positions (L-N) as of December 24, 1980 (Exhibit #6). Approximately 85% of Staley's female work force have seniority dates after that date. As Exhibit 6 establishes, however, women hired on or after November 22, 1974 and employed by the Company have worked in at least 10 of the remaining 11 labor grades and have held at least the following jobs:

Job Title	Labor Grade	Department (s)
Service Labor	B	44, 22, 32, 47
Labor	A	Extra Board
Development Engineer Helper (C)	C	59
Development Engineer Helper (B)	D	59
Development Engineer Helper (A)	E	59
Dump and Clean	B	118
Sewing Room Operator Trainee (B)	A	64
Sewing Room Operator Trainee (A)	B	64
Sewing Room Operator	C	64
Cleaner	A	1, 20, 75, 99, 100, 101, 102, 197, 108, 108-A, 12
Conversion Unit Helper	E	20
P&S Mixer Operator	F	20
Trucker and Dumper	F	20
P&D Mixer Operator	F	20
P & S Drier Operator	G	20
Process Support	E	100, 101, 102, 107, 108
Production Control Operator	G	100, 101, 102, 107, 108
Extraction Operator	J	100, 101, 102, 107, 108
Utility	E	20
Tr. Analyst	G	60
Railcar Handler	F	100, 101, 102, 107, 108
Extruder Operator	H	20
Floor Gang	C	20
Loader	C	22, 32, 34, 37, 17
Helper	B	29
Lead Packer	G	29, 75
Acidulator and Treatment Tank Operator	F	29

Job Title	Labor Grade	Department (s)
Deodorizer Operator	I	29
Westfalia Operator	I	29
Lower Steep Tender	F	3, 4, 6
Upper Steep Tender	H	3, 4, 6
P&S Mixer Operator	F	20
Pump & Tank Operator	H	5, 10, 3, 4, 6
Carbon Operator	H	5, 10
Ion Exchange Operator	H	5, 10
Evaporator Operator	J	5, 10
4th Floor Operator	G	111
Process Operator	F	12
Flash Drier & Grind Operator	I	12
East End Operator	G	12
Building Operator	H	
Chemical Operator	H	16
Utility Operator	F	16
Grain Cleaner Operator	G	25, 28, 3, 4, 6
Bag Dump and Clean	B	118
Drier Operator	G	9, 12, 118

Moreover, both male and female employees hired on or after November 22, 1974 have averaged slightly more than four job transfers per employee. Finally, a comparison of the percentages of females and males who were employed in the higher labor grades (E-J) shows that there is no discrimination in job assignments and positions:

Labor Grade	% Of Female Employees	% Of Male Employees
E	19.4	18.8
F	13.9	20
G	11.1	13.2
H	5.6	14.1
I	8.4	10.9
J	2.8	2.6

The above facts fully demonstrate that job assignments are made without regard to race or sex. Rather, seniority as set forth in the collective bargaining agreement and the ability of the employee, after training, to perform the duties of the job are the only factors involved in job assignment.

C. *Training and Promotion:* Just as the Contract strictly governs job assignment, it likewise controls training and promotion. As previously discussed, Staley imposes no educational requirements on its work force and all employees are hired to the Extra Board. Thus, all training is on-the-job.

Article IV § 10 guarantees each employee, regardless of race or sex, the right to such on-the-job training:

> (3) In departments, other than mechanical departments, which have less than five regularly assigned employees on a shift, every employee on that shift must, within six months of the date of this contract, qualify for step-up on the job rated next above his regular job or be disqualified from the department.
>
> (4) The Company agrees to have trained step-up employees for all hourly paid jobs. Failure to so provide them will be subject to the grievance procedure.

This right to "step-up" training cannot be withheld by the Company for any reason. Rather, the employee must waive, in writing, the right to such training. The ability to waive such training, moreover, is limited to employees with five or more years plant-wide seniority. (Article IV § 6(B)(1)).

In keeping with an employee's right to on-the-job training, Article IV § 5(B) and (G) provides that all employees are eligible for promotion. In addition, Article IV § 10 guarantees that an employee cannot be denied a promotion merely because of lack of training or experience:

> (1) An employee otherwise eligible for a job, but lacking the required experience, may bid for and be awarded title to the job in accordance with regular procedure. During

training for the job the employee receiving training will be paid in accordance with Article VI-2-G.

(2) An employee otherwise eligible for a job but lacking the required training because he has waived step-up on it may bid for and be awarded the job, if he has no waiver outstanding against the job at the time he bids.

In addition to the training and promotional opportunities governed by the procedures set forth above, Staley and the Union have established apprenticeship programs for its skilled craft positions. No employees have been accepted in the apprenticeship programs within 180 days preceding Commissioner Leach's purported charge (See Exhibit #3). Consequently, no charge of discrimination with regards to those programs is timely. In addition, the facts establish no discrimination with regard to the operation of these programs.

All blue-collar employees are eligible to bid for a vacancy into the Mechanical Apprenticeship Program after demonstrating potential ability and aptitude for mechanical work. Employees may demonstrate their potential by successfully completing Pre-Apprenticeship courses conducted by a local community college. The course work consists of one semester of math, mechanics and mechanical drawing and sketching. Staley pays the tuition and fees for all employees who enroll in the courses and the Company, if necessary, will pay the tuition and fees for any employee who needs to take the course a second time. Approximately 80% of all employees who have successfully completed the Mechanical Apprenticeship Program since 1974, became eligible for the program by successfully completing the course work.

Staley actively encourages and recruits black and female employees to participate in the Pre-Apprenticeship Program. Thus, whenever the program is offered, the Company advises its black and female employees by letter and provides counseling for those employees who are interested in the program.

Employees, who feel they already possess the skills acquired in the Pre-Apprenticeship Program, are given the opportunity to "opt out" of the course work by demonstrating their potential apptitude and ability on the math and mechanical reasoning portions of a standardized pre-apprenticeship test. Only 27% of the employees who have taken this test since 1974 have been able to pass it the first time. Employees who fail the test can, nevertheless, enroll in the Pre-Apprenticeship courses.

Since 1974, 92 employees have successfully completed Staley's Mechanical Apprenticeship Program. Nine (9.8%) of these employees are black. Moreover, 12% of all black employees are employed in the highest craft positions (Labor Grade "N") In comparison, the U.S. Department of Labor statistics for the Decatur SMSA for July, 1979 reveals that only .8% of the black labor force held such positions. Thus, Staley's percentage of black skilled craftsmen is 15 times greater than would be expected based upon availability. In addition, of the six employees currently enrolled in the Mechanical Apprenticeship Program, two or 33⅓% are black.

In addition to the Mechanical Apprenticeship Program, Staley and the Union also have a Painter-Roofer Apprenticeship Program. There are no testing or course requirements for entry into this program. Bids for vacancies are awarded solely on the basis of seniority and no employee with less than 19 years seniority has successfully bid into that program.

Once an employee has completed the Pre-Apprenticeship courses or has passed the math and mechanical reasoning portions of the standardized pre-apprenticeship test, the employee is eligible to bid into a vacancy in the apprenticeship program. Bids are awarded in the following order:

(a) Employees who hold title to a Helper job in the shop involved;

(b) Employees who are on lay-off from the shop involved;

(c) Plant-wide seniority.

The average employee had more than nine years of plantwide seniority before admission into the apprenticeship program.

Only three female employees have sought to become eligible for the Mechanical Apprenticeship Program. One woman has successfully completed the Pre-Apprenticeship course work and is currently eligible to bid for a vacancy in the Mechanical Apprenticeship Program.

These facts demonstrate that seniority and the ability to be trained are the only factors governing training and promotion at Staley. Moreover, the evidence establishes that blacks and women have taken full advantage of their contractual rights to training Program. and promotion. Consequently, the Commissioner's allegation is without merit.

D. *Terminations:* Staley has discharged no female blue-collar employee after March 30, 1980, the time period relevant to the charge. Accordingly, Commissioner Leach's allegation is untimely.

It is also inaccurate. Plant rules regarding discipline, penalties and discharges are set forth in Article XIII of the Contract. These rules are applicable to all blue-collar employees without regard to sex, and any discipline administered pursuant to those rules is subject to the grievance and arbitration procedure set forth in Article III of the Contract.

As Exhibit #7 demonstrates, 13.3% of all males hired from November 22, 1974 through March 3, 1980 were discharged for misconduct or related matters, while only 6.4% of the females hired during that time period have been discharged. Thus, the charge that Staley discharges its female employees at a greater rate than its male employees has no basis in fact.

CONCLUSION

For any and all of the reasons set forth herein, Staley respectfully requests that the Commission dismiss the charge in its entirety for lack of jurisdiction and reasonable cause.

A. E. STALEY MANUFACTURING COMPANY

BY_____

C. R. Gangemi, Jr.
Gerald C. Peterson
Its Attorneys

STATE OF ILLINOIS
COUNTY OF MACON } ss.:

AFFIDAVIT

Hulen F. Jenkins, being first duly sworn under oath, deposes and states:

1. That I am employed by A. E. Staley Manufacturing Company, Respondent in the matter *Leach* v. *A. E. Staley Manufacturing Co.*, EEOC Charge No. 051810066, as Manager of Plant Services at its Decatur, Illinois facility;

2. In that position, I have overall responsibility for recruiting and hiring all hourly production and maintenance employees at the Decatur facility; I also have overall responsibility for the implementation of all apprenticeship programs covered in the collective bargaining agreement between A. E. Staley Manufacturing Company and the Allied Industrial Workers of America, AFL-CIO, Local No. 837;

3. A. E. Staley has recruited no applicants for permanent blue-collar positions since November, 1979 and has hired no permanent blue-collar employees at its Decatur facility since March 3, 1980;

4. No employees have been accepted into any apprenticeship program covered by the collective bargaining agreement between the above-mentioned parties since prior to March 3, 1980.

Further, Affiant saith not.

/s/ HULEN F. JENKINS
Hulen F. Jenkins

Subscribed and sworn to before me this day of July, 1981.

/s/ GLORIA F. KOCACKANY
Notary Public

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

IN THE MATTER OF:

Commissioner Daniel Leach
Charging Party,

v.

A. E. Staley, Manufacturing Company,
Respondent.

CHARGE NO. 051-81-006
SUBPOENA NO. CH-81-12

Addressees: Donald Nordlund, Chairman
2200 E. Eldorado Street
Decatur, Illinois 62525

C.R. Gangemi, Jr.
Gerald C. Peterson
Attorneys for A.E. Staley Manufacturing Company
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603

DETERMINATION ON APPEAL PETITION

Respondent-Appellant has timely filed an appeal from a Determination of the Director of the Chicago District Office denying its Petition to Revoke a Subpoena. The requisite number of Commissioners having reviewed the appeal petition pursuant to the Commission's Procedural Regulations, 29 C.F.R. 1601.16(b), the Commission hereby denies the appeal petition for the reasons stated below.

In its appeal the Respondent complains that Acting Director Kelley misstated the Company's grounds in support of its

petition to revoke and then failed to apply proper legal standards to resolve the issues raised. In its original petition the Respondent states as ground No. 1:

> "The charge is invalid in that it fails to allege that Commissioner Leach had a good faith and reasonable belief for his conclusion that the Company is in violation of the Act."[1]

Section 706(b) of Title VII the Civil Rights Act of 1972 controls the filing of a charge and the contents required therein. In pertinent part, it requires: "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The requirement of a statement of "reasonable cause" (reasonable belief) no longer exists as a requirement for a valid charge. See, *EEOC* v. *Dean Witter Company, Inc.*, 643 F. 2d 1334 (9th Cir. 1980) rehearing denied Dec. 22, 1980.

With respect to Respondent's exception 7(e) as to the District Director's interpretation of *EEOC* v. *Dean Witter, Inc.*, we disagree with Respondent's position that Determination III misstates the holding in *Dean Witter*. The complaint voiced by the court in *Dean Witter* was that the use of the term "continuing" only "informs Dean Witter and the court that the practices are continuing in the present but does not disclose whether the practices have occurred in the past, or at least, when they began in the past". In the instant case Commissioner Leach alleges that violations have occurred since at least July 2, 1965, and continued through the present. The statement by the District Director that inquiry into employment practices may extend even to practices prior to the effective date of Title VII may be a gratuity, but it is a correct statement of the law nonetheless.

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[1] The Commission is at a loss to understand Respondent's exception 7(a) in its appeal. Because of this lack of understanding, the Commission is therefore unable to respond to Respondent's exception 7(b) except to state that the case of *EEOC* v. *Gas Institute of Technology*, 23 FEP Cases 825 is established law in the Northern District of Illinois.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Equal Employment Opportunity Commission, *Applicant,* *v.* A.E. Staley Manufacturing Co. *Respondent,*	Civil Action No. 81C7182

APPLICATION FOR ORDER TO SHOW CAUSE WHY A SUBPOENA SHOULD NOT BE ENFORCED

1. This is an action for enforcement of a subpoena *duces tecum* issued pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* (hereinafter "Title VII").

2. Jurisdiction is conferred upon the Court by Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. Sections 2000e-5(f)(3) and 9. Section 710 of Title VII incorporates Section 11 of the National Labor Relations Act, 29 U.S.C. Section 161, which authorizes the applicant to invoke the jurisdiction of this Court to hear this matter.

3. Applicant, Equal Employment Opportunity Commission (hereinafter "the Commission"), is the federal agency charged with administration and enforcement of Title VII, including *inter alia,* the investigation of charges of unlawful employment practices.

4. Respondent, A.E. Staley Manufacturing Company (hereinafter "Staley") is an Illinois Corporation doing business in Illinois with its headquarters and largest manufacturing facility located at 2200 Eldorado Street in Decatur, Illinois.

5. On September 30, 1980, a Commissioner charge was issued by Commissioner Daniel Leach charging Staley with various violations of Title VII. A copy of the charge is attached hereto as Exhibit A.

6. On February 17, 1981, the Commission issued and served on Staley subpoena No. CH 81-12. The subpoena *duces tecum* required Staley to produce evidence needed as part of the Commission's investigation of the Commissioner charge. A copy of the subpoena is attached hereto as Exhibit B.

7. Counsel for Staley informed the Commission orally and in writing that, if the Commission would withdraw the subpoena, Staley would voluntarily begin to submit the information sought, reserving, however, the right to object to and refuse to provide specific items. Counsel for Staley indicated that, if the Commission did not withdraw the subpoena, "[t]he Company, however, will not release any information under compulsion unless and until the Commission's right to that information has been fully litigated and established by the courts." A copy of a letter from counsel for Staley to the Commission dated February 19, 1981, is attached hereto as Exhibit C.

8. Counsel for Staley, in addition, filed a timely Petition to Revoke Subpoena, pursuant to the Commission's Procedural Regulations, 29 C.F.R. Section 1601.16(b). A copy of the petition is attached hereto as Exhibit D.

9. The Acting Director of the Chicago District Office on April 15, 1981, issued his Determination, refusing to revoke the subpoena. A copy of the Determination is attached hereto as Exhibit E.

10. Counsel for Staley, thereupon, on April 24, 1981, appealed the Acting District Director's Determination to the Commission. A copy of the appeal is attached hereto as Exhibit F.

11. On August 12, 1981, the Commission issued its Determination denying the appeal petition. Staley was notified on August 27, 1981, that the date for compliance with the subpoena was set for September 9, 1981. A copy of the Commission's Determination is attached hereto as Exhibit G. A copy of the letter of notification is attached hereto as Exhibit H.

12. Pursuant to the request of counsel for Staley, on September 4, 1981, the Commission granted Staley an extension to September 28, 1981, to comply with the subpoena.

13. On September 22, 1981, counsel for Staley informed the Commission by letter that Staley would not comply with the subpoena. A copy of the letter is attached hereto as Exhibit I.

14. To date, Staley has failed to comply fully with the subpoena.

15. The affidavit of Edward D. Kelly, Acting Director of the Chicago District Office is submitted in support hereof as Exhibit J.

WHEREFORE, the Commission prays:

(a) That an order to show cause be issued forthwith directing Staley to appear before this Court on a day certain to be fixed by said order and to show cause, if there be any, why an order should not be issued directing Staley to comply fully with the subpoena;

(b) That upon return of said order to show cause, an order be issued directing Staley to comply fully with the subpoena;

(c) That the Commission be granted such further relief as may be necessary and appropriate.

Respectfully submitted,

MICHAEL J. CONNOLLY
General Counsel

JAMES N. FINNEY
Associate General Counsel

Equal Employment Opportunity Commission
2401 E Street N.W.
Washington, D.C. 20506

JOHN P. ROWE
Regional Attorney

RICHARD SUTTER
Supervisory Trial Attorney

/s/ SIDNEY B. CHESNIN
Sidney B. Chesnin
Trial Attorney

Equal Employment Opportunity Commission
Chicago District Office
55 East Jackson Blvd., Rm. 1401
Chicago, Illinois 60604
(312) 353-7545

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Susan Getzendanner

Cause No. 81 C 7182 Date Dec. 28, 1981

Title of Cause: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. A. E. STALEY MANUFACTURING CO.

Brief Statement of Motion: Application for Order to Show Cause

The rules of this court require consel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: Sidney B. Chesnin, EEOC, Chicago District Office 55 East Jackson Blvd. Chicago, IL 60604

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

_____

Reserve space below for notations by minute clerk

Respondent, A. E. Staley Manufacturing Co., is directed to appear on January 11, 1982, at 10:00 a.m., and show cause why the Commission's subpoena should not be enforced. See DRAFT.

Getzendanner, *Judge*

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Equal Employment Opportunity Commission,
Applicant,
v.
A. E. Staley Manufacturing Co.
Respondent,

CIVIL ACTION
NO. 81 C 7182

ORDER TO SHOW CAUSE

The Equal Employment Opportunity Commission has filed an application for an order requiring Respondent A.E. Staley Manufacturing Company to show cause why an administrative subpoena requiring the Respondent to produce certain evidence should not be enforced. The subpoena was issued on February 17, 1981 in the course of the investigation of the matter of *Commissioner Daniel E. Leach v. A.E. Staley Manufacturing Company,* Charge No. 051810066, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-9. The subpoena was duly served on the Respondent.

The Court having considered the application for an order to show cause why a subpoena should not be enforced and sufficient cause appearing in support thereof,

IT IS HEREBY ORDERED that Respondent, A.E. Staley Manufacturing Company, appear before this Court on the 11th day of January, 1982, at 10:00 A.M., or as soon thereafter as counsel can be heard, and show cause, if any there be, why this Court should not grant the relief prayed for by the Applicant and enter an order directing the Respondent to comply fully with the subpoena issued on February 17, 1981.

IT IS FURTHER ORDERED that service of a copy of this Order To Show Cause, together with a copy of said Application of the Equal Employment Opportunity Commission and, Affidavit, Exhibits and Memorandum in support thereof shall be made on Respondent on or before the 5th day of January, 1982.

Dated: December 28, 1981.

/s/ SUSAN GETZENDANNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Equal Employment Opportunity Commission, *Applicant,* *v.* A. E. Staley Manufacturing Company, *Respondent.*	Civil Action No. 81C7182 Before Judge Getzendanner

RESPONSE TO APPLICATION FOR AND ORDER TO SHOW CAUSE

Respondent, A. E. STALEY MANUFACTURING COMPANY, by its attorneys C. R. Gangemi, Jr. and Gerald C. Peterson, in response to Applicant's Application and this honorable Court's Order To Show Cause, states as follows:

1. Respondent has declined to produce documents subpoenaed by Applicant because the charge of former Commissioner Leach, pursuant to which the Subpoena was issued, is invalid under §§ 706(b) and 707(e) of Title VII, *as amended,* 42 U.S.C. § 2000 *et seq.*, and Commission Rule 1601.12(a)(3), 29 CFR § 1601.12(a)(3) in that:

a. The charge is a Commissioner's charge alleging pattern discrimination at Respondent's Decatur, Illinois facility and lists July 2, 1965 as the beginning date of the alleged unlawful practices.

b. On information and belief, the EEOC, as a matter of practice and policy, simply inserts July 2, 1965, the effective date of the Act, as the beginning date of alleged unlawful employment practices in all cases where a pattern

allegation is contained in a discrimination charge filed by an EEOC Commissioner. On information and belief, former Commissioner Leach had no basis in fact for the date alleged in the charge.

c. Despite repeated requests by Staley, the EEOC has flatly refused to provide any explanation whatsoever of any alleged factual bases for the charge (Exhibits 1 and 2).

2. Respondent has declined to produce documents subpoenaed by Applicant because the charge of former Commissioner Leach, pursuant to which the Subpoena was issued, is invalid under § 706(b) of the Act in that:

a. The allegations of discrimination made by former Commissioner Leach are mere conclusory allegations with no apparent basis in fact.

b. The charge fails to allege either specific evidence of an existing violation or that reasonable legislative or administrative standards for conducting an investigation are satisfied with respect to Respondent.

c. Despite repeated requests by Staley, the EEOC has flatly refused to provide any explanation whatsoever of any alleged factual bases for the charge (Exhibits 1 and 2).

d. On information and belief, former Commissioner Leach had no reasonable cause to believe that a violation of the Act had occurred.

3. Respondent has declined to produce documents subpoenaed by Applicant in that the EEOC, under §§ 706(e) and 709(a) of the Act, lacks jurisdiction to investigate former Commissioner Leach's charge pursuant to which the Subpoena was issued in that:

a. In response to former Commissioner Leach's charge, Staley has voluntarily produced documents and evidence establishing that the Company neither recruited nor hired any permanent blue-collar workers at its Decatur, Illinois facility within 180 days of the filing of the charge (Exhibit 3).

b. In response to former Commissioner Leach's charge, Staley has voluntarily produced documents and evidence establishing that it discharged no female blue-collar workers at its Decatur facility within 180 days of the filing of the charge (Exhibit 3).

c. In response to former Commissioner Leach's charge, Staley has voluntarily produced documents and evidence establishing that no employees were accepted into its apprenticeship programs at the Decatur facility within 180 days of the filing of the charge (Exhibit 3).

d. Accordingly, the allegations cannot serve as bases for an EEOC investigation and further casts doubt on whether former Commissioner Leach had any reasonable bases in fact for the allegations or sufficient information regarding the allegations at the time he was required to swear that the allegations were true.

4. Respondent has declined to produce documents subpoenaed by Applicant because the procedure by which the EEOC held the Subpoena valid violated Respondent's right to due process as guaranteed by the Fifth Amendment in that:

a. Pursuant to Rule 1601.16(b) of the Commission's Rules, Respondent duly appealed to the Commission that it revoke the Subpoena.

b. Under that Rule, the Commissioner who issued the subpoena must abstain from reviewing any petition to modify or revoke it.

c. On information and belief, former Commissioner Leach did not abstain from reviewing Respondent's petition even though one of the grounds for the petition and appeal was the invalidity of former Commissioner Leach's charge.

5. Respondent has declined to produce documents subpoenaed by Applicant in that to the extent the Subpoena seeks information regarding Respondent's employment practices prior to March 30, 1980, it is beyond the scope of the Commission's power to investigate as set forth in § 709(a) of the Act.

6. Respondent has declined to produce documents subpoenaed by Applicant in that, to the extent the Subpoena seeks information regarding Respondent's facilities, except for its Decatur, Illinois facility, it is unreasonable and unduly burdensome in that it is beyond the scope of the charge.

WHEREFORE, Respondent prays that this Court issue an Order declaring former Commissioner Leach's charge invalid and quashing the instant Subpoena. In the alternative, Respondent prays that this Court issue an order remanding this matter to the Commission so that Respondent will have a fair opportunity to have its defenses heard by an impartial Commission.

A. E. STALEY MANUFACTURING COMPANY

By_____

C. R. Gangemi, Jr.
Gerald C. Peterson
Its Attorneys

OF COUNSEL:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Susan Getzendanner

Cause No. 81 C 7182 Date April 5, 1982

Title of Cause: Equal Employment Opportunity Commission v. A. E. Staley Manufacturing Company

Brief Statement of Motion: _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: _____

_____

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

_____

_____

Reserve space below for notations by minute clerk

Defendant Staley's motion to strike is denied. Staley is ordered to comply with the subpoena *duces tecum.* (DRAFT)

Susan Getzendanner, *Judge*

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Applicant,*	
v.	81 C 7182
A. E. STALEY MANUFACTURING COMPANY, *Respondent.*	

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

This is an action by the Equal Employment Opportunity Commission ("EEOC") for an enforcement of a subpoena *duces tecum* issued pursuant to Section 710 of Title VII of the 1964 Civil Rights Act against the A. E. Staley Manufacturing Company ("Staley"). For the reasons stated herein, the EEOC's application to enforce the subpoena is granted.

Pursuant to Section 706 (b) of Title VII, Commissioner Leach of the EEOC charged Staley with unlawful employment discrimination. In furtherance of its investigation, the EEOC requested but did not receive in its entirety certain information pertaining to Staley's employees from January 1, 1978 to the present. When Staley refused to comply with the request, a subpoena *duces tecum* was issued. Staley petitioned the EEOC to invoke the subpoena and was denied; subsequent appeal was also denied.

Staley first questions whether the Commissioner's charge of discrimination was valid. Interpreting Section 706(b), the Ninth Circuit Court indicated the requirements for a valid charge of employment discrimination. The charge must allege time, place and circumstances of the employment practice alleged to be discriminatory and the charge must be made under oath. *EEOC* v. *Dean Witter Co., Inc.*, 643 F.2d 1334 (9th Cir. 1980). Both requirements were met in Commissioner Leach's charge. Moreover, the *Dean Witter* court explicity held that it was not necessary for a charge to allege that there was reasonable cause for making it; the "under oath" requirement subsumed the good faith basis for the charge when made by an EEOC Commissioner. *Id.* at 1337.

The next issue concerns the legitimacy of the subpoena issued by the EEOC in its investigation of the Commissioner's charge. In general, the Supreme Court has held that administrative subpoenas are not governed by the probable cause standard. *U.S.* v. *Powell*, 379 U.S. 48, 57 (1964). Specifically, it has been held that the EEOC need not show probable cause of a violation before issuing a request for documents as the whole purpose of an EEOC investigation is to determine if probable cause exists. *EEOC* v. *Bay Shipbuilding Corp.*, No. 81-1328 (7th Cir. Dec. 31, 1981), slip. op. at 14.* The subpoenaed information need only be material and relevant to the investigation of a potential violation. *EEOC* v. *Chrysler*, 567 F.2d 754, 755 (8th Cir. 1977). The material requested by the EEOC conforms to these standards.

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* The Seventh Circuit recognized an exception to this rule where "the employer raises a substantial question that judicial enforcement of the administrative subpoena would be an abusive use of the court's process." *Id.* Staley attempts to raise such a question by arguing that it did not recruit or hire any permanent blue-collar workers in the 180 days preceding the filing of the charge and that the charge is thus without any basis. The charge, however, encompasses promotion and training policies as well as recruiting and hiring, and Staley has not shown that there is no basis for the charge as to these policies.

Additionally, a subpoena is not invalid merely because the employer is required to make compilations nor because the employer asserts that compliance with it is burdensome. The *Bay Shipbuilding* Court indicated that the test for unduly burdensome compliance is whether compliance would threaten the normal operation of the business. *Bay Shipbuilding, supra,* at 15. Staley has not satisfied this test.

The *Dean Witter* court also held that the EEOC does not have to supply all the information that provided the basis for the charge to the charged party. *Id.* at 1339. Staley is therefore not entitled to additional information as long as the charge itself was valid.

Finally, Staley requests a hearing on its objections to the subpoena. For the reasons articulated in *Bay Shipbuilding, supra,* at 8-10, no evidentiary hearing is required.

A valid charge such as this is sufficient to allow the EEOC to begin investigation procedures which include the power to issue subpoenas. Staley's motion to strike is denied. Staley is ordered to comply with the subpoena *duces tecum.*

/s/ SUSAN GETZENDANNER

Susan Getzendanner
United States District Judge

Dated: April 5, 1982

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Equal Employment Opportunity Commission, *Applicant,* *v.* A. E. Staley Manufacturing Company, *Respondent.*	No. 81C7182 Before Judge Getzendanner

MOTION FOR RECONSIDERATION AND STAY OF ORDER ON THE BASIS OF INTERVENING SUPREME COURT AND OTHER AUTHORITY

Respondent, A. E. STALEY MANUFACTURING COMPANY, by its attorneys C. R. Gangemi, Jr. and Gerald C. Peterson moves the Court to reconsider the Memorandum Opinion and Order dated April 5, 1982 enforcing Applicant's subpoena and, upon such reconsideration, to deny enforcement of the subpoena or, in the alternative, to set the matter for hearing. Respondent also moves the Court to stay the Order pending said reconsideration.

As grounds Respondent shows:

A. The Court noted that where a respondent raises a substantial question that judicial enforcement of an administrative subpoena would be an abusive use of the Court's process, the EEOC is required to establish probable cause for its investigation. *Cf., EEOC v. Bay Shipbuilding,* 27 EPD § 32,314 (7th Cir. Dec. 31, 1981). The Court further noted that Staley may have raised such substantial questions with regard to recruitment and hiring of permanent blue-collar employees, but it failed to do so with respect to promotion and training of such workers.

The Court's decision, however, was made without benefit of the Supreme Court's decision in *American Tobacco Company v. Patterson*, ____ U.S. ____, 50 LW 4364 (April 5, 1982). In that case the Supreme Court held that *bona fide* seniority systems are immune from attack under Title VII. *See also, Teamsters v. U.S.*, 431 U.S. 324 (1977); *United Airlines v. Evans*, 431 U.S. 553 (1977).

It is undisputed that promotion and training opportunities for Staley's work force are governed by the provisions of a *bona fide* seniority system embodied in the collective bargaining agreement between the Company and the Union. Accordingly, Respondent requests the Court to reconsider its determination that Staley failed to raise substantial questions with regard to the Company's promotion and training policies in light of *American Tobacco Company v. Patterson.*

B. When this Court prepared its Memorandum Opinion and Order, the decision of the District Court for the District of Colorado in *EEOC v. C. A. Norgren Company*, 81-C-1665, No. 64 *Daily Labor Report* D-1 (BNA April 2, 1982) (attached hereto as Exhibit 1) was not widely published. In that case the court denied enforcement of an EEOC subpoena because the underlying charge was invalid. That court held:

> 1. Pro forma insertion of Title VII's effective date in a Commissioner's Charge violates the Act by failing to provide any meaningful notice to the employer of the time when the claimed violations allegedly occurred;
>
> 2. Pro forma insertion of the Act's effective date fails to advise the court and the charged party of the proper scope of the investigation;
>
> 3. Pro forma insertion of the effective date fails to advise the charged party of the basis or scope of the charge; and

4. Pro forma insertion of the Act's effective date Act seriously undermines the required oath or affirmation which must support an EEOC charge.

In that the facts of the instant case are virtually identical to the facts presented in *C. A. Norgren,* Respondent requests this Court to reconsider its determination that former Commissioner Leach's charge is valid in light of the *C. A. Norgren* decision.

C. In light of this Court's finding that Staley may have raised substantial questions with regards to the EEOC's authority to investigate Staley's hiring and recruitment policies (as well as termination of female blue-collar workers), Staley requests this Court reconsider its Order enforcing the subpoena as to those areas.

D. In light of the substantial questions raised by Staley and the holdings in *American Tobacco Company* and *C. A. Norgren,* Respondent requests this Court to reconsider its decision not to grant Staley an opportunity to be heard before forcing the Company to comply with the EEOC's overly broad and unduly burdensome subpoena. At such a hearing, Staley would show:

1. Former Commissioner Leach did not have a good faith basis for his allegation that Staley has discriminated against black and female blue-collar workers and applicants for such employment for the last seventeen years;

2. The EEOC has no probable cause to investigate Staley's promotion and training policies in that such policies are governed by a *bona fide* seniority system;

3. The EEOC has no probable cause to investigate Staley's recruitment and hiring practices for permanent blue-collar employees or its policies with regard to the termination of female blue-collar employees in that no such workers were recruited, hired or, in the case of women employees, terminated within 180 days of the filing of the charge.

E. A stay of this Court's Order pending reconsideration is required in that Staley's right to be free from this investigation cannot be otherwise effectively protected. *See e.g., FTC v. Miller,* 549 F.2d 452 (7th Cir. 1977).

WHEREFORE, Respondent requests that the Court grant its Motion for Reconsideration and stay its Order pending said reconsideration.

Respectfully submitted,

A. E. STALEY MANUFACTURING COMPANY

By_____

C. R. Gangemi, Jr.
Gerald C. Peterson
Its Attorneys

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

EEOC, *Plaintiff,*	
vs.	81 C 7182
A. E. Staley, *Defendant.*	

Transcript of Proceedings had in the above-entitled cause before HON. SUSAN GETZENDANNER, one of the Judges of said Courtin her courtroom in the United States Courthouse at Chicago, Illinois, on Friday, April 16, 1982, at 10:00 a.m.

PRESENT:

Mr. Sidney B. Chesnin,
on behalf of plaintiff;

Mr. Gerald C. Peterson,
on behalf of defendant.

* * *

THE CLERK: 81 C 7182. EEOC v. A. E. Staley. Motion for reconsideration.

MR. CHESNIN: Sidney Chesnin for EEOC.

MR. PETERSON: Gerald C. Peterson for the respondent Staley.

THE COURT: I see that the Supreme Court decided something the day after I decided something.

MR. PETERSON: The same day, as a matter of fact, your Honor.

THE COURT: The same day. What nerve.

MR. CHESNIN: Your Honor, I don't think it has anything to do with this case.

THE COURT: I don't think it does either but the Colorado case I think clearly relates to this case and my decision is directly contrary or different from the Colorado court's decision and it is an intriguing decision and I would like the EEOC to respond to the motion.

MR. CHESNIN: Your Honor, if I may, I believe the Colorado case is exactly the same as the K-Mart case which you already had in front of you and which I distinguished in my brief.

Frankly, in that case what happened was the original charge had no date on it and then in 1979 a date was amended in. Our charge had a date. There are no allegations whatsoever in this case that would put it into the same as the Colorado case or the K-Mart case.

I frankly don't see how there is anything more to say about the Colorado case than we said about the K-Mart case. To rule otherwise in our case would mean that every time a Commissioner charged that since the date that the Act was in effect, July 2, 1965, there had been a pattern and practice of dis-

crimination, you would say that is automatically incorrect, that the Commissioner is automatically lying under oath because he picked the date of the Act.

If it is true that 85 percent of their women were hired after a date relatively recently, then it is quite obvious that what we are saying is that back when the Act was first in effect, they were not hiring, promoting and training women and, as a result, that's what we went back to. We don't go back before that date. That is exactly what the basis of this is.

Now their defenses just are that, their defenses on the merits are nowhere near the merits in this case. If we don't find probable cause on our investigation, we will dismiss it at that point.

THE COURT: Has the Commission done any sort of empirical analysis of how many women were in the work force and would even have wanted this kind of job after 1965?

MR. CHESNIN: Your Honor, that is exactly the type of thing the Commission does when they send the thing to Washington to the Commissioner. The whole point is that we package all of this information up. We do an analysis of the work force, we do an analysis of the availability. It all goes to Washington and the Commissioner looks it over and gets recommendations from his staff and at that point decides whether to issue the charge. That's what happens.

Now for the defendants to come in and say he has an absolute right to know exactly what we did in this case goes directly in the face of Dean Witter and every other case.

So what we have here is basically the defendant taking a case where for whatever factual reasons the judge decided in this case there was evidence that the Commissioner did not have any basis for using July 2, 1965, and I guarantee, your Honor, that the Sixth Circuit doesn't think very much of that because they have already stayed the deposition of the Com-

missioner in the K-Mart case and I know that we will appeal the Colorado case.

I think you made the right decision. We distinguished the K-Mart case. If you make the other decision, what you are saying as a matter of law is any commissioner who swears in his charge that since July 2, 1965 there has been discrimination at a company has lied, period.

THE COURT: All right.

MR. PETERSON: Your Honor, first of all, on that point with regard to that, we have alleged and as was filed in K-Mart and as was filed in the District of Colorado case, that the EEOC inserts the date July 2, 1965 as a matter of policy without any basis in evidence—without any evidentiary basis, and that was the allegation we made, that was the allegation made in the District of Colorado case, not that the Commissioner, that Commissioner Leach had—we have asked does he have any basis in fact and we have been told by the EEOC, "We don't have to tell you that."

This is the first time anyone has said anything at all with regard to documents going up and the like and Commissioner Leach reviewing information and the like. There has been no allegation at all and they have not denied the fact that that July 2, 1965 date was inserted cimply as a matter of EEOC policy without regard to whether or not there was ever any evidentiary basis for the insertion of that date.

THE COURT: What you have said to me this morning as the EEOC lawyer persuades me that my decision is correct, but nothing you have said has been presented to me in a formal sense. I am not sure I can just—maybe I can.

MR. CHESNIN: Your Honor, it is on the record right now. If there is an appeal, it goes up with the transcript.

THE COURT: Are you telling me that in this particular case there was some analysis by the Commissioner and the EEOC?

MR. CHESNIN: Your Honor, that is the case in this case and I am sure it is the case in every case, but I can tell you in this case that a package went up to Washington with the analysis of the work force and the analysis of the EEO-1 data, and, in fact, we told Mr. Peterson in a letter in which we said, "We will not tell you exactly what we did in this case because that is privileged, but what we do in all cases is to make an analysis based on the work force, an analysis on EEO-1 data, information from charging parties in other cases, and there is a companion case, the Connelly charge, in which we have interviewed him and other individuals about that information. We told him that this is the type of information that goes to the Commissioner and Mr. Connelly, you know, has spoken to us. Similarly there is, in fact, a subpoena outstanding in that case.

MR. PETERSON: Your Honor—

MR. CHESNIN: The fact—

Excuse me, Mr. Peterson, I am still talking.

The fact is, your Honor, that what we are trying to avoid quite frankly is having the Court make another determination as to whether or not the material we submitted to Washington was a sufficient amount of material for us to make a charge because that would be doing the same thing as was held to be improper in the Attorney General cases; namely, you would be saying instead of us whether there is cause to believe that they have discriminated. That is why we—

THE COURT: I assure you I did not want to do that and that is why I issued the order opposing [enforcing] the subpoena, but what you are telling me is that the date was inserted, the effective date of the Act was inserted as the date applicable in this case, not because of any policy that these

dates are always inserted in the charges but because there was a submission and the opportunity for the analysis of data which would support the inclusion of that date.

MR. CHESNIN: That is true, your Honor, and not only that, in the briefs—

THE COURT: That is enough. That is enough.

I am prepared to uphold the decision on the basis of that representation.

MR. PETERSON: Your Honor, it would appear to me that that is what we have been seeking throughout. Mr. Chesnin has now made the assertion that there was such documentation. That assertion is made in the face of two court holdings that this date is inserted as a matter of EEO policy.

There has been no statement from the Commissioner or from anyone else who is responsible for the preparation of this charge that Mr. Chesnin's statement is, in fact, true.

THE COURT: Except he—

MR. PETERSON: I am not disputing Mr. Chesnin but what I am saying is that we have presented affidavits showing that in point of fact there was no hiring at all within 180 days of the filing of the charge.

THE COURT: That argument does not persuade me. What we are talking about is the insertion of the effective date of the Act.

MR. PETERSON: Your Honor, we believe that on the basis of our raising that as a substantial question, that the EEOC under the Bay Ship ruling is required to show that it did, in fact, have probable cause.

Now I believe again they don't have to show there was, in fact, a violation, but, yes, they do have to show this Court that they did, in fact, have probable cause for the insertion of that

date and we believe that the only way that that probable cause can be established is to have the person who made the charge or who inserted the date state under oath. Now they can do that by affidavit or by hearing.

THE COURT: I don't think that I should inquire in that depth on a subpoena issue.

In this case I am not going to have a hearing on these issues. I think I am going to take the representations of counsel that in this case there was data which was available for analysis and that the date, the effective date of the Act, was not inserted merely as a matter of policy of the EEOC.

Is that your representation?

MR. CHESNIN: That it is, your Honor.

THE COURT: On the basis of that representation, the motion for reconsideration is denied.

MR. PETERSON: Your Honor, with regard to our motion also for stay, will you stay this order so that we can take it up on appeal then?

MR. CHESNIN: Your Honor—

THE COURT: No, I will not.

MR. PETERSON: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

EEOC, *Plaintiff,*		
vs.		81 C 7182
A. E. STALEY, *Defendant.*		

I hereby certify that the above and foregoing transcript, pages 1 to 10, is a full, true and accurate transcription of my original shorthand notes taken in the above-entitled cause on the 16th day of April, 1982.

Official Court Reporter

Dated: April 19, 1982.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Susan Getzendanner
Cause No. 81 C 7182 Date April 16, 1982
Title of Cause: Equal Employment Opportunity Commission v. A. E. Staley Manufacturing Company
Brief Statement of Motion: Motion For Reconsideration And Stay Of Order On The Basis Of Intervening Supreme Court And Other Authority

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

C. R. Gangemi, Jr.
Gerald C. Peterson
Winston & Strawn
One First National Plaza
Suite 5000
Chicago, Illinois 60603

Representing: A. E. Staley Manufacturing Company
Names and Addresses of other counsel entitled to notice and names of parties they represent:

Sidney B. Chesnin, Esq.
Equal Employment Opportunity Commission
Chicago District Office
55 East Jackson Boulevard
Room 1401 Chicago, Illinois 60604

Reserve space below for notations by minute clerk

Defendant's motion for reconsideration and stay of the order entered April 5, 1982 is denied for the reasons stated in open court.

Susan Getzendanner, *Judge*

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 1, 1983.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

Equal Employment Opportunity Commission,
Petitioner-Appellee,

No. 82-1655 *vs.*

A. E. Staley Manufacturing Company,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 7182

Susan Getzendanner, Judge.

Opinion by Judge Grant

Judge Bauer dissenting

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court filed this date.

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 20, 1983

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

Equal Employment Opportunity Commission,
Petitioner-Appellee,

No. 82-1655 *vs.*

A.E. Staley Manufacturing Co.,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 7182

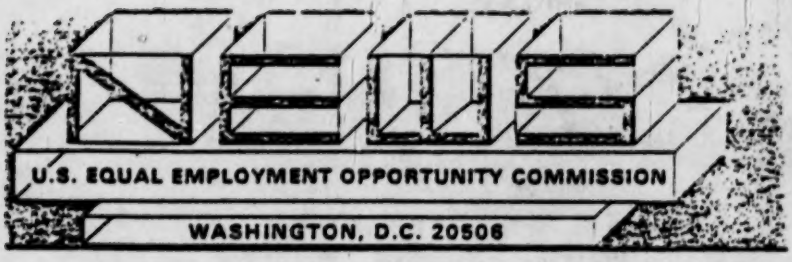
Judge Susan Getzendanner

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by respondent-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.



FOR IMMEDIATE RELEASE
MONDAY, MARCH 20, 1978
E.S.T.

CONTACT: Daisy Voigt
Director
Office of Public Affairs
or
Joan Hannan
202/634-6930

EEOC ANNOUNCES CRITERIA FOR SELECTING COMPANIES FOR MAJOR PATTERN AND PRACTICE CASES

The U. S. Equal Employment Opportunity Commission (EEOC), today announced criteria under which employers and others subject to Title VII of the 1964 Civil Rights Act will be selected as subjects for Commission-initiated EEOC charges of systemic pattern and practice employment discrimination. This is the first time the Commission has published such standards.

By unanimous vote the Commission authorized the selection criteria as part of EEOC's program to eliminate the broad-based, systemic type of employment discrimination that affects large numbers of minorities and women. EEOC Chair Eleanor Holmes Norton explained, "We are announcing these selection standards so that employers and others have the guidance they need to come into compliance with Title VII. An employer will now know that if his employment practices fit one or more of the criteria, he may become the subject of an EEOC systemic proceeding."

Systemic discrimination is a term referring to institutionalized employment practices which, although often neutral

in intent, operate to keep minorities and women from job opportunities available to others. The Commission may institute systemic proceedings against a respondent who meets any one of the following standards:

1. Employers or other persons subject to Title VII who continue in effect policies and practices which result in low utilization of available minorities and women despite the clear obligation in Title VII to fairly recruit, hire and promote such persons.

2. Employers or other persons subject to Title VII who employ available minorities and women at a substantially lower rate than other employers in the same labor market who employ persons with the same general level of skills.

3. Employers or other persons subject to Title VII who employ substantial numbers of minorities and women, but employ them at significantly lower rates in higher paid job categories.

4. Employers or other persons subject to Title VII who maintain specific recruitment, hiring, job assignment, promotion, discharge, and other policies and practices relating to the terms and conditions of employment that have an adverse impact necessity. Such policies and practices may include, but are not limited to, those prohibited in Commission Guidelines on Sex Discrimination, 29 C.F.R. 1604; Religious Discrimination, 29 C.F.R. 1605; National Origin Discrimination, 29 C.F.R. 1606 and the Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, and other guidelines as they may be adopted and amended from time to time.

5. Employers or others subject to Title VII whose employment practices have had the effect of restricting or excluding available minorities and women from significant employment opportunities, and who are likely to be used as models for other employers because of such factors as the number of their employees, their impact on the local economy, or their competitive position in the industry.

6. Employers (a) who because of expanding employment or significant turnover rates, even if the employer's workforce is stable or in retrenchment, are likely to have substantial numbers of employment opportunities and (b) whose practices may not provide available minorities and women with fair access to these opportunities.

The Commission will use the new standards for internal guidance in exercising administrative discretion. The standards do not require the Commission to proceed against any particular person or company, or prevent any other proceeding which would further the purposes of Title VII.

The primary EEOC vehicle for instituting a systemic proceeding will be the "Commissioner's charge", which may be filed by any member of the Commission. The Commission will investigate and attempt to conciliate the charge; if conciliation fails, the charge may be litigated.

The EEOC enforces Title VII of the 1964 Civil Rights Act, as amended, which prohibits employment discrimination based on race, color, religion, sex or national origin.

# # # # #

78/7-3-17-78

Office - Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

A. E. STALEY MANUFACTURING COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR CERTIORARI SHOWING THAT *EEOC V. SHELL OIL COMPANY*, No. 82-825, DOES NOT CONTROL THIS CASE

GEORGE B. CHRISTENSEN
(Counsel of Record)
COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner
A. E. STALEY MANUFACTURING COMPANY

Of Counsel:
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

Pandick Midwest, Inc., Chicago • 454-7600

Supplemental Questions Presented for Review

1. Is a charge which is so broad and expansive as to amount to no more than a charge that the employer has violated Title VII of the Civil Rights Act valid?

2. Must an employer have notice of the nature of the circumstances constituting its "believed" violation of Title VII of the Civil Rights Act for the EEOC to have jurisdiction to issue a subpoena calling for documents supposedly "relevant" to the sworn "believed" violation?

3. May an employer challenge the validity of a Commissioner's charge of systemic discrimination on the ground that the charge does not show that it satisfies the EEOC's "criteria" for the issuance of such charges?

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May it please the Court:

Petitioner sought to have this case heard in conjunction with *EEOC* v. *Shell Oil Company*, 82-825. That did not occur. But the Court, thus far, has withheld disposition of the petition. On April 2, 1984 *Shell* was decided against some of petitioner's contentions here. Therefore, this supplement is proffered to show that disposition of *Shell* in favor of EEOC does not mean this case should be decided similarly because:

1. The charge here is far broader and at the same time much less informative than the one in *Shell*. In *Shell*, the Court noted that Shell" * * * understood from the outset the charge was based upon statistical manifestations of discrimination derived from the annual reports filed by respondent with the

Commission." (*Shell*, 52 L.W. 4401 n.6.). And Shell knew that a dispute existed as to the relevant employment market against which its own statistics were to be measured. (*Shell*, dissent, 52 L.W. at 4409).

But in the case at bar, Staley does not know to this day why it was selected for a charge, and, if it be assumed that the Commissioner consulted the Commission's "Criteria for Selecting Companies for Major Pattern and Practice Cases" (App. to Pet., 69a) which, if any, of the "standards," the Commissioner may have believed applied. So far as Staley is informed, it is a mere guinea pig selected for vivisection is a theoretical experiment as to how well Title VII is honored in central Illinois.

Moreover, the charge at bar (App. 20a) is far broader than the one in *Shell:*

It charges that Staley discriminated against blacks and women in *all* blue-collar positions, denying them "the opportunity to work in *all* blue-collar departments; failing to provide blacks and women with "opportunities" for promotion, assignment and training. (App. 20a-21a) In sum, because the charge is all embrasive it can fairly be said that Staley would have been as fully informed if the Commissioner had charged outrightly and blankly, "Staley violated and violates Title VII of the Civil Rights Act." But the *Shell* opinion holds that such a hypothetical charge and notice would be insufficient because:

> "Such a result would be inconsistent with the evident purpose * * to encourage complainants to identify with as much precision as they can muster the conduct complained of. And it would render nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant to a charge.'" (*Shell*, 53 L.W. at 4404).

The Court is faced with the fact that the lengthy accusations of the charge here go so far as to be no more than a general claim that Staley has violated virtually every proscription of Title VII. We suggest, that in other fields the Court would not permit such a monstrosity by a police seargant. Does *Shell* authorize it?

An example of the vicious uncertainty but sweeping accusatory nature of the instant charge is that in specification No. 2 (App. 21a) it says Staley "[restricts] and/or [excludes]" blacks and women from "*all* blue-collar positions." The blatant falsity of the first alternative of that indictment is demonstrated by specification No. 5 which claims that Staley "*terminates*" women in disproportionate numbers. Discharges women it never hired?

Surely, the Court should hear the case and rule that due process, the statute and the regulations require that high federal functionaries deal with citizens more fairly and frankly than that.

2. The charge at bar (App. 21a) accuses Staley of maintaining a seniority system in the collective bargaining agreement which operates to "perpetuate" the effects of Staley's discriminatory policies. (App. 21a) This is not a charge that the seniority system itself is discriminatory; it is not a charge that the collective bargaining agreement is not *bona fide*. As shown by the Petition for Certiorari, a *bona fide* seniority system that merely perpetuates alleged discrimination is not unlawful. (*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). No such seniority system problem existed in *Shell*. The charge here, so far as it alleges a seniority system perpetuation of discrimination is, therefore, invalid on its face. (The charge was issued prior to *American Tobacco*). The Court should speak to this issue.

3. And there is the matter of limitations: Staley made a sworn showing that it had recruited no applicants for permanent blue-collar employees since March 3, 1980, nor had any employees been accepted into any apprenticeship training program covered by the collective bargaining agreement since prior to March 3, 1980. Staley also showed that it had a discharged no female blue-collar workers after March 30, 1980. (App. 63a) Unless those showings can gratuitously be denigrated as perjury, none of the discriminatory acts claimed in the

charge, could have occurred within 180 days of its issuance. The charge is tolled by the statute's 180-day limitation period. No such issue was presented in *Shell.*

The *Shell* opinion cannot be without boundaries or limitations. Yet it can be read as conferring upon the EEOC the roving inquisitorial power that the Federal Trade Commission in fact possesses (See *U.S. V. Motron Salt Co.*, 338 U.S. 632, 642). It would seem that the Court does not intend to go that far because it quotes (52 L.W. at 4402) the "Interpretative Memorandum" of Senators Clark and Case that "*** the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission." This case can determine the boundaries of *Shell's* language.

The propositions which we suggest are worthy of full briefing and argument. The undersigned are not satisfied that they have properly stated the Supplemental Questions Presented for Review in the light of *Shell.* Time is needed to investigate them adequately. So called "systemic investigations" are time-consuming and expensive for employers. The Commission should not be allowed to harass employers with such burdens unless there is some plausible showing as to why it should.

Congress withheld from the Commission the power to enforce its own subpoenas. It did not intend that the federal courts rubber-stamp every subpoena issued by an overzealous agency.

We understand that a grant of the writ will put ultimate disposition of this case into the next term. But the questions are fundamental. Meanwhile no harm will be done because Staley in fact does not discriminate. (See Staley's "Statement of Position (submitted pursuant to the Commission's procedures.)) (App. 51a et seq.)

Respectfully submitted,

GEORGE B. CHRISTENSEN
(Counsel of Record)
COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner
A. E. STALEY MANUFACTURING COMPANY

Office - Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-401

In the Supreme Court of the United States

OCTOBER TERM, 1983

A.E. STALEY MANUFACTURING COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

DIANNA B. JOHNSTON
Attorney

Equal Employment Opportunity Commission
Washington D.C. 20507

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE RESPONDENT

Petitioner contends that a charge of unlawful employment discrimination filed by a Commissioner of the Equal Employment Opportunity Commission under Sections 706(b) and 707(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and 2000e-6(e), must set forth the detailed factual basis for the allegations of discrimination contained in the charge.

1. On October 6, 1980, Daniel Leach, then a Commissioner of the Equal Employment Opportunity Commission, issued a sworn commissioner's charge pursuant to Sections 706(b) and 707(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and 2000e-6(e), alleging unlawful employment practices at petitioner's Decatur, Illinois, facility (Pet. App. 2a-3a & n.1, 20a-22a). The charge arose out of the Commission's systemic charge processing program. Commissioner Leach alleged that he had reason to

believe that, at least since July 2, 1965, petitioner had refused to hire blacks and women for all blue collar positions and had excluded them from those positions; had failed to provide blacks and women with equal opportunities for promotion, assignment and training; had terminated women at a disproportionate rate; and had maintained discriminatory terms and conditions of employment, to the detriment of blacks and women. The charge and its accompanying notice were duly served on petitioner, along with a request for employment information relevant to the charge (Pet. App. 2a-3a n.1, 39a). Petitioner refused to provide any of the requested documents, and demanded that the Commission provide the factual basis for the charge (Pet. App. 3a-4a, 23a-24a). On February 17, 1981, the Commission issued a subpoena duces tecum to obtain employment-related data for the period January 1, 1978, to the present (Pet. App. 4a, 26a-35a). On December 28, 1981, following petitioner's continued refusal to provide the information necessary for an investigation of Commissioner Leach's charge, the Commission brought this subpoena enforcement action in the United States District Court for the Northern District of Illinois (Pet. App. 4a, 66a).

The district court enforced the Commissioner's subpoena, rejecting petitioner's argument that the charge underlying the subpoena was invalid. The district court held that the charge adequately set forth the date, place and circumstances of the alleged discriminatory conduct and found that, because the charge was sworn, Commissioner Leach's good faith was presumed (Pet. App. 4a, 79a). The court concluded that the material requested by the EEOC was material, relevant, and not unduly burdensome for petitioner to produce, and it therefore ordered petitioner to comply with the subpoena (*id.* at 4a-5a, 79a-80a).

The court of appeals affirmed (Pet. App. 1a-18a). It concluded that a Commissioner's charge need not set forth a detailed factual basis because such a requirement would, in effect, compel the agency to demonstrate that it had reasonable cause to believe that a violation of the Act had occurred before it could conduct its investigation to determine whether such cause in fact existed (Pet. App. 7a-12a). See 42 U.S.C. 2000e-5(b). The court of appeals further held that the "date" requirement of Section 706(b) was met by the inclusion of July 2, 1965, in the charge. Because the EEOC may be uncertain of the temporal scope of the alleged unlawful employment practices at the outset of its administrative process, the court concluded that a good faith estimate of the time periods involved in the alleged discriminatory conduct satisfied the notice requirements of Section 706(b). That requirement was met here, the court noted, because the July 2, 1965, date was included in the charge under oath, and the good faith presumption arising from the oath was not overcome by the "bare, unsupported allegations of [petitioner's] counsel that the EEOC had a policy of inserting *pro forma* the effective date of the Act." Pet. App. 13a.

Finally, the court rejected petitioner's contention that the Commission's investigation should be halted because petitioner's actions were protected by a bona fide seniority system and the Commission could not prove that the alleged discriminatory acts had continued to within 180 days of Commissioner Leach's charge (Pet. App. 14a-15a). 42 U.S.C. 2000e-8(a). Recognizing that these arguments were nothing more than defenses on the merits, the court held that (Pet. App. 14a):

> the mere assertion by an employer that his employment practices are lawful does not deprive the EEOC of jurisdiction. No action would ever be brought against an employer if the jurisdiction of the EEOC depended

upon the assertions of employers as to whether their own employment practices were lawful.

2. As petitioner correctly observes (Pet. 8), this case and *EEOC* v. *Shell Oil Co.*, No. 82-825, on which oral argument has been heard by this Court (Oct. 31, 1983), "present opposite sides of the same coin." In both cases the issue is whether, before obtaining enforcement of an administrative subpoena, the EEOC must plead the factual basis for the date, place and circumstances of the discrimination alleged in the underlying Commissioner's charge. Accordingly, the Court should hold this case pending its decision in *Shell Oil*.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

DIANNA B. JOHNSTON
Attorney

Equal Employment Opportunity Commission

NOVEMBER 1983

DOJ-1983-11

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE B. CHRISTENSEN
(Counsel of Record)
COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner, A.E. Staley Manufacturing Company

Of Counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

Pandick Press Midwest, Inc., Chicago • 454-7600

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REPLY IN SUPPORT OF PETITION

The Solicitor General's filing is not entitled as in "Opposition To Certiorari". The importance of the case is recognized.

This case is like, but different from *EEOC* v. *Shell Oil Company,* No. 82-825, and should receive plenary consideration so that all issues may be settled authoritatively.

In the case at bar, Judge Bauer dissented, recognizing that Congress had commanded that date, place and circumstances *be included in a Commissioner's charge.* He held the charge here failed to meet the statute. But the majority of the Panel, admitting that the date element of a charge is important, nevertheless sustained the July 2, 1965 date in the case at bar because an EEOC lawyer "testified" there was something,

somewhere to support it. Surely the Court cannot support such evasion of the statute.

There is no such question in *Shell.*

The Solicitor General's memorandum, suggesting that the Court hold this case pending its decision in *Shell,* would treat Staley's contention and the undisputed facts of this record that no discriminatory practices could have taken place within 180 days filing of charge because there were no hirings, firings or promotions, as a *defense on the merits.* On the contrary, *questioning the Commissioner's jurisdiction* does not go to the merits of Staley's conduct at all.

Finally, the Solicitor General's memorandum cites the inaccurate statement of the majority of the Seventh Circuit Panel that Staley's assertion that the date July 2, 1965 is inserted as a matter of commission practice in so called "systemic" charges as supported only by the "bare, unsupported allegations of [petitioner's] counsel" that the EEOC had such a policy. As shown by the Petition, Staley's position was established by the judicial findings of the United States District Court for the Eastern District of Michigan and the District Court of the District of Colorado. (See Pet. 5, 6)

While this case is like *Shell Oil* and presents one issue common to both cases, it presents other important questions. Briefing and argument of this case would give the Court a better opportunity to decide all major issues involved in the so called "systemic" charge system than the Court would have if it decided either case alone.

Our respectful suggestion is that final decision in *Shell* be withheld pending plenary disposition of this case and that the two cases finally be considered and decided together. The cases supplement each other and an understanding of one aids understanding of the other.

Respectfully submitted,

GEORGE B. CHRISTENSEN
(Counsel for Record)
COLUMBUS R. GANGEMI, JR.
GERALD C. PETERSON
Attorneys for Petitioner, A.E. Staley Manufacturing Company

Of Counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600